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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 342

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PETITIONERS,

vs.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1938.

CERTIORARI GRANTED OCTOBER 17, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 342

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PETITIONERS,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

At Law. No. 11,047

FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, Trustees, Chicago, Rock Island and Pacific Railway Company, a Corporation, Appellants,

vs.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, a Corporation, Appellee

DESIGNATION OF APPELLANT OF PARTS OF RECORD TO BE PRINTED—Filed November 3, 1937

Come now the Appellants in the above-entitled cause and request the Clerk of the Court to print all of the transcript except those portions of Plaintiffs' Exhibit 2 which are crossed out, said Plaintiffs' Exhibit 2 being the advance report of the Interstate Commerce Commission decision more particularly referred to as Chicago Board of Trade et al., vs. Abilene & Southern Railway Company et al., appearing in the transcript as Plaintiffs' Exhibit 2. It will be found that in this exhibit certain portions are marked out, and those particular portions marked out should not appear in the printed record.

Respectfully, Conrad & Durham, I. M. Lee, Charles M. Miller, Cyrus Crane, Geo. J. Mersereau, Dean Wood, Attorneys for Appellants.

[fol. 2] Service of copy of this document acknowledged this 1st day of November, 1937.

Borders, Borders & Warrick, Attorneys for Appellees.

[File endorsement omitted.]

Citation, in usual form, showing service on Borders, Borders & Warrick, filed August 31, 1937 omitted in printing.

[fol. 3] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

PETITION—Filed April 4, 1936

Now come Frank O. Lowden, James E. Gorman and Joseph B. Fleming, and state and show to the court that on the 22nd day of November, 1933 (effective from and after December 1, 1933), the said Frank O. Lowden, James E. Gorman and Joseph B. Fleming were duly appointed trustees of the Chicago, Rock Island & Pacific Railway Company, by the District Court of the United States for the Northern District of Illinois, Eastern Division, in a bankruptcy proceeding therein pending.

Plaintiffs for their cause of action against the defendant, Simonds-Shields-Lonsdale Grain Company, state that they are now, and were at all the times herein mentioned, as trustees of said railway company, engaged in interstate commerce and interstate commerce transportation by railroad into and through many states, and that the shipments hereinafter set forth are and were interstate shipments; that defendant is a corporation organized and existing according to law.

[fol. 4] Plaintiffs further state that this suit is one arising under the Constitution and Laws of the United States of America, and particularly the said Act or Acts of Congress to regulate Commerce, and also the Act of Congress of March 3, 1911, being "An Act to Modify and Amend the Laws Relating to the Judiciary", commonly known as the "New Judiciary Act", in that the right to collect charges, and the amount of money herein sued for, and the right, privilege and immunity to sue for, recover and enforce the same is solely given, and the duty to collect the same is enjoined, enforced and compelled by said Interstate Commerce Act or Acts, or law or laws regulating commerce, and by reason of the premises, this suit is one arising under said Interstate Commerce Act or Acts, or law or laws regulating commerce, as aforesaid.

That heretofore, and long prior to the acts, matters, things and transactions hereinafter mentioned and stated, in compliance with the Act of Congress of February 4, 1887, being "An Act to Regulate Commerce," and all subsequent

acts amendatory thereto, and all subsequent amendments and additions thereto, commonly known as the Interstate Commerce Act, or Acts, plaintiffs filed with the Interstate Commerce Commission of the United States of America, in the District of Columbia, their printed schedule, and printed and kept open for public inspection said schedule, showing all the rates, fares and charges for transportation, between points on their own route, and points on the route of any other carriers by railroad, and also stating separately all terminal charges, storage charges, and all other charges as required by said Commission, all privileges or facilities granted or allowed, and any and all rules or regulations which in anywise changed, affected or determined any part or the aggregate of the aforesaid rates, and charges, or the value of the services rendered to shippers or consignees, and duly posted and published the same, as required by said Act or Acts, and stated therein the following provisions, effective July 1, 1935, establishing a charge of one dollar per car for installing, as shipper's agent, at terminal elevator points specified in said tariff, grain doors for carload shipments in bulk, of grain, grain products, seeds and other articles taking same rates, as specified in said tariff, transported in interstate commerce:

"(1). Grain Doors or Lumber for necessary side door barricades (also for necessary and door barricades, if car [fol. 5] is [equipped] with end doors requiring such protection) for carload shipments *in bulk*, of grain, grain products, seeds and other articles taking same rates, as specified in Lists Nos. 1, 2, 3, 4, 5, 6, Items Nos. 200 to 270, inclusive, will be furnished at loading stations without charge, by the initial road-haul carrier. (See Note 1). The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time:

* * * * * * *

Kansas City * * * Mo.-Kan."

Plaintiffs further state that on various dates, since the effective date of said tariff, plaintiffs, at the request and upon

the order of the defendant, delivered certain cars at certain grain elevators designated by the defendant for loading grain and grain products, in bulk, by the defendant, which said cars after being so loaded were transported over the lines of the plaintiffs, the initial road-haul carrier and connecting lines to destination; that the loading point and unloading point of each of said shipments were not within the same terminal or switching district.

Plaintiffs further state that after said cars had been placed for loading, as aforesaid, and prior to the loading thereof, and pursuant to the provisions of said [tariff], plaintiffs, as the initial road-haul carrier, and as the defendant's agent, installed the necessary grain doors in each of said cars, the defendant having previously notified plaintiffs that it would not accept from plaintiffs for loading with bulk grain or grain products cars that were not fully coopered with grain doors and that were not suitably and properly prepared for loading bulk grain or grain products; that under and by virtue of the applicable tariff then on file with Interstate Commerce Commission as aforesaid, the defendant became indebted to plaintiff for the said installation by plaintiffs of said grain doors as [foresaid], in the sum of one dollar ($1.00) per car, or the total sum of Six Hundred Twenty-four Dollars ($624.00).

Plaintiffs further state that the following tabulated statement shows the date and number of the waybills, the initial [fol. 6] and number of cars in which said bulk grain shipments were made, the date the grain doors were installed by the plaintiffs, the destination of the various shipments, and the charge for installing the grain doors on each of said cars:

Sheet 1

Statement of cars coopered for bulk grain loading at Kansas City Mo-Kans., durinh month of July 1935 for the account of Simon Shields-Lonsdale Grain Co

7-8

Waybill Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charge
7-5	92374	MTLW	703292	7-2	Knoxville Ia	$1.00
7-17	53447	UP	79166	7-15	Des Moines Ia	1.00
7-17	53448	Frisco	149103	7-12	Do	1.00
7-22	89507	Frisco	162820	7-16	Fostoria Ohio	1.00
7-22	89506	SP	29688	7-18	Do	1.00
7-22	89508	CBQ	131830	7-22	Do	1.00
7-5	88859	RI	40986	7-5	Springfield Ill	1.00
7-6	88904	RI	18830	7-6	Do	1.00
7-6	51211	RI	141831	7-8	Des Moines Ia	1.00
7-8	51210	RI	140729	7-8	Do	1.00
7-8	51209	RI	141485	7-8	Do	1.00
7-8	88952	RI	40981	7-8	Springfield Ill	1.00
7-8	88951	WM	23087	7-8	Do	1.00
7-9	92523	CNW	139732	7-8	Harrisburg Va	1.00
7-9	88973	MSTL	18810	7-8	Fostoria Ohio	1.00
7-9	88972	ACL	50560	7-8	Do	1.00
7-9	88971	RI	141866	7-8	Do	1.00
~~7-9~~	~~88895~~	~~MP~~	~~95142~~	~~7-9~~	~~Milwaukee Wisc~~	~~0.85~~ #
7-11	89107	RI	44309	7-11	Springfield Ill	1.00
7-12	89153	RDG	5137	7-11	Milwaukee Wisc	1.00
7-12	89152	RI	141234	7-11	Do	1.00
7-12	89151	RI	141389	7-11	Do	1.00
7-12	89150	RI	140652	7-12	Do	1.00
7-12	89149	PA	43017	7-12	Do	1.00
7-12	89148	HCR	899	7-12	Do	1.00
7-12	89147	RI	141347	7-12	Do	1.00
7-12	89146	RI	141501	7-12	Do	1.00
7-12	89145	CO	7178	7-12	Do	1.00
7-12	89144	BO	269656	7-12	Do	1.00
7-12	89143	RI	140634	7-12	Do	1.00
7-12	89154	Frisco	147180	7-11	Do	1.00
7-12	52409	RI	45625	7-12	Atchison Kans	1.00
7-12	52408	MSTL	18788	7-12	Do	1.00
7-13	92681	RI	141201	7-12	Massilon Ohio	1.00
7-12	52402	RI	140654	7-12	Des Moines Ia	1.00
7-12	52405	RI	141143	7-12	Do	1.00
7-12	52406	CO	8497	7-12	Do	1.00
7-12	52407	OMA	33024	7-12	Do	1.00
7-12	52404	PA	68452	7-12	Do	1.00
7-12	52403	RI	141451	7-12	Do	1.00
7-15	95	B&O	268236	7-15	Davenport Ia	1.00
7-15	89234	NP	14959	7-15	Springfield Ill	1.00
7-15	89233	CP	220736	7-15	Do	1.00

7-8	51210	RI	140729	7-8	Do	1.00	
7-8	51209	RI	141485	7-8	Do	1.00	
7-8	88952	RI	40981	7-8	Springfield Ill	1.00	
7-8	88951	WM	23087	7-8	Do	1.00	
7-9	92523	CNW	139732	7-8	Harrisburg Va	1.00	
7-9	88973	MSTL	18810	7-8	Fostoria Ohio	1.00	
7-9	88972	ACL	50560	7-8	Do	1.00	
7-9	88971	RI	141866	7-8	Do	1.00	
~~7-9~~	~~88895~~	~~MP~~	~~95142~~	~~7-9~~	~~Milwaukee Elec~~	~~0.85~~	#
7-11	89107	RI	44309	7-11	Springfield Ill	1.00	
7-12	89153	RDG	5137	7-11	Milwaukee Wisc	1.00	
7-12	89152	RI	141234	7-11	Do	1.00	
7-12	89151	RI	141389	7-11	Do	1.00	
7-12	89150	RI	140652	7-12	Do	1.00	
7-12	89149	PA	43017	7-12	Do	1.00	
7-12	89148	HCR	893	7-12	Do	1.00	
7-12	89147	RI	141347	7-12	Do	1.00	
7-12	89146	RI	141501	7-12	Do	1.00	
7-12	89145	CO	7178	7-12	Do	1.00	
7-12	89144	BO	269656	7-12	Do	1.00	
7-12	89143	RI	140634	7-12	Do	1.00	
7-12	89154	Frisco	147180	7-11	Do	1.00	
7-12	52409	RI	45625	7-12	Atchison Kans	1.00	
7-12	52408	MSTL	18788	7-12	Do	1.00	
7-13	92681	RI	141201	7-12	Massilon Ohio	1.00	
7-12	52402	RI	140654	7-12	Des Moines Ia	1.00	
7-12	52405	RI	141143	7-12	Do	1.00	
7-12	52406	CO	8497	7-12	Do	1.00	
7-12	52407	OMA	33084	7-12	Do	1.00	
7-12	52404	PA	68482	7-12	Do	1.00	
7-12	52403	RI	141451	7-12	Do	1.00	
7-15	95	B&O	268236	7-15	Davenport Ia	1.00	
7-15	89234	WP	14959	7-15	Springfield Ill	1.00	
7-15	89233	CP	220736	7-15	Do	1.00	
7-15	89235	RI	140733	7-15	Do	1.00	
~~7-16~~	~~98896~~	~~RI~~	~~140868~~	~~7-16~~	~~Midland Mill~~	~~0.85~~	#
~~7-16~~	~~98896~~	~~RI~~	~~140468~~	~~7-16~~	~~Do~~	~~2.25~~	#
~~7-16~~	~~98896~~	~~RI~~	~~141886~~	~~7-16~~	~~Do~~	~~2.85~~	#
~~7-16~~	~~98896~~	RI	~~140398~~	~~7-16~~	~~Do~~	~~2.25~~	#
~~7-16~~	~~98896~~	~~RI~~	~~140084~~	~~7-16~~	~~Do~~	~~2.85~~	#
7-16	89290	RI	41027	7-16	Springfield Ill	1.00	
7-16	89289	RI	42496	7-16	Do	1.00	

Cross Town

Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charge	
7-16	89288	RI	44133	7-16	Springfield Ill	$1.00	
7-16	89287	B4	56345	7-16	Do	1.00	
7-16	89286	IC	154754	7-16	Do	1.00	
7-16	53128	WP	22523	7-16	Des Moines Ia	1.00	
7-16	89284	TNO	53651	7-16	Springfield Ill	1.00	
7-16	89283	RI	141486	7-16	Do	1.00	
7-16	89285	RI	155880	7-16	Do	1.00	
~~7-19~~	~~89297~~	~~RI~~	~~141784~~	~~7-19~~	~~Midland Mill~~	~~0.25~~	#
~~7-19~~	~~89297~~	~~RI~~	~~142267~~	~~7-19~~	~~Do~~	~~0.25~~	#
~~7-19~~	~~89297~~	~~RI~~	~~141280~~	~~7-19~~	~~Do~~	~~0.25~~	#
~~7-19~~	~~89297~~	~~RI~~	~~141606~~	~~7-19~~	~~Do~~	~~0.25~~	#
~~7-19~~	~~89297~~	~~RI~~	~~142664~~	~~7-19~~	~~Do~~	~~0.25~~	#
7-19	92936	RI	157299	7-19	Massillon Ohio	1.00	
7-22	89498	RI	140217	7-19	Springfield Ill	1.00	
7-22	89497	RI	142791	7-19	Do	1.00	
7-22	89496	RI	43232	7-19	Do	1.00	
7-19	54024	IC	157018	7-19	Des Moines Ia	1.00	
7-22	89495	RI	43007	7-22	Springfield Il	1.00	
7-22	89494	RI	41990	7-22	Do	1.00	
7-22	89499	CNW	128860	7-22	Do	1.00	
7-22	89500	CNW	103894	7-22	Do	1.00	
7-22	89501	IGN	16075	7-22	Do	1.00	
7-24	89617	Frisco	146728	7-24	Do	1.00	
7-24	89616	SL	132774	7-24	Do	1.00	
7-24	89615	RI	45569	7-24	Do	1.00	
7-24	89614	RI	42068	7-24	Do	1.00	
7-24	89613	PA	568321	7-24	Do	1.00	
7-24	89612	RI	158594	7-24	Do	1.00	
7-24	89611	RI	43272	7-24	Do	1.00	
7-24	89610	RI	41812	7-24	Do	1.00	
7-24	89609	RI	43406	7-24	Do	1.00	
7-25	89693	CNW	137050	7-25	Do	1.00	
7-25	89692	Erie	75122	7-25	Do	1.00	
7-25	89691	IGN	6358	7-25	Do	1.00	
7-25	89690	ITC	8102	7-25	Do	1.00	
7-25	89689	IGN	9584	7-25	Do	1.00	
7-25	89688	SL	134 970	7-25	Do	1.00	
7-25	89687	B&O	276564	7-25	Do	1.00	
7-25	89686	RI	46191	7-25	Do	1.00	
7-25	89685	LA	12148	7-25	Do	1.00	
7-25	89684	IGN	9467	7-25	Do	1.00	
7-25	89688	PLE	36407	7-25	Do	1.00	
7-25	89694	SP	37704	7-25	Do	1.00	
7-25	89695	B&O	271643	7-25	Do	1.00	
7-25	93153	RI	142741	7-25	Hillsdale Mch	1.00	
7-25	93155	RI	142252	7-25	Do	1.00	
7-25	93156	RI	140340	7-25	Do	1.00	
7-25	93157	RI	141168	7-25			

					Do	1.00
~~7-19~~	~~92897~~	~~RI~~	~~141966~~	~~7-19~~	~~Midland Mill~~	~~0.95~~ #
~~7-19~~	~~92897~~	~~RI~~	~~142967~~	~~7-19~~	~~Do~~	~~0.95~~ #
~~7-19~~	~~92897~~	~~RI~~	~~141966~~	~~7-19~~	~~Do~~	~~2.95~~ #
~~7-19~~	~~92897~~	~~RI~~	~~142965~~	~~7-19~~	~~Do~~	~~0.95~~ #
~~7-19~~	~~92897~~	~~RI~~	~~142964~~	~~7-19~~	~~Do~~	~~0.95~~ #
7-19	92936	RI	157299	7-19	Massillon Ohio	1.00
7-22	89498	RI	140217	7-19	Springfield Ill	1.00
7-22	89497	RI	142791	7-19	Do	1.00
7-22	89496	RI	43232	7-19	Do	1.00
7-19	54024	IC	157018	7-19	Des Moines Ia	1.00
7-22	89495	RI	43007	7-22	Springfield Il	1.00
7-22	89494	RI	41990	7-22	Do	1.00
7-22	89499	CNW	128860	7-22	Do	1.00
7-22	89500	CNW	103894	7-22	Do	1.00
7-22	89501	IGN	16075	7-22	Do	1.00
7-24	89617	Frisco	146728	7-24	Do	1.00
7-24	89616	SL	132774	7-24	Do	1.00
7-24	89615	RI	45569	7-24	Do	1.00
7-24	89614	RI	42068	7-24	Do	1.00
7-24	89613	PA	568321	7-24	Do	1.00
7-24	89612	RI	158594	7-24	Do	1.00
7-24	89611	RI	43272	7-24	Do	1.00
7-24	89610	RI	41812	7-24	Do	1.00
7-24	89609	RI	43406	7-24	Do	1.00
7-25	89693	CNW	137050	7-25	Do	1.00
7-25	89692	Erie	75122	7-25	Do	1.00
7-25	89691	IGN	6358	7-25	Do	1.00
7-25	89690	ITC	8102	7-25	Do	1.00
7-25	89689	IGN	9584	7-25	Do	1.00
7-25	89688	SL	134 970	7-25	Do	1.00
7-25	89687	B&O	276564	7-25	Do	1.00
7-25	89686	RI	46191	7-25	Do	1.00
7-25	89685	LA	12148	7-25	Do	1.00
7-25	89684	IGN	9467	7-25	Do	1.00
7-25	89688	PLE	36407	7-25	Do	1.00
7-25	89694	SP	37704	7-25	Do	1.00
7-25	89695	B&O	271643	7-25	Do	1.00
7-25	93153	RI	142741	7-25	Hillsdale Mch	1.00
7-25	93155	RI	142252	7-25	Do	1.00
7-25	93156	RI	140340	7-25	Do	1.00
7-25	93157	RI	141167	7-25	Do	1.00
7-25	93154	RI	142972	7-25	Do	1.00
						44.00

Cross Town

Sheet 3- Simon Shields-Lonsdale Grain Co- July 193

Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charge
7-30	[illegible]	RI	[illegible]	[illegible]	Midland Elev	[illegible] #
						[illegible] #
[illegible]	[illegible]	RI	[illegible]	[illegible]	Do	[illegible] #
[illegible]	[illegible]	SP	[illegible]	[illegible]	Do	[illegible] #
[illegible]	[illegible]	RI	[illegible]	[illegible]	Do	[illegible] #
[illegible]	[illegible]	Pa	[illegible]	[illegible]	Do	[illegible] #
7-29	89745	Pa	64796 ✓	7-26	Springfield Ill	1.00
7-29	89744	PRM	9724 ✓	7-26	Do	1.00
7-29	89743	B&O	266998 ✓	7-26	Do	1.00
7-29	89742	RI	48539 ✓	7-26	Do	1.00
7-29	93276	NCO	181057 ✓	7-26	Massillion Ohio	1.00
7-22	89503	RI	41838 ✓	7-22	Springfield Ill	1.00
7-22	89502	SP	15689 ✓	7-22	Do	1.00
7-20	92972	IC	156920 ✓	7-20	Massillion Ohio	1.00
[illegible]	[illegible]	RI	[illegible]	[illegible]	Empire Elev	[illegible] #
						9.00

Cross Town

Statement of cars coopered for bulk grain loading at Kansas City,Mo-Kansas during month August 1935 for account Simonds Shields Lonsdale Grain Co

Waybill Date	Number	Car Initial	Number	Date Coopered	Destination	Coopering Charge
8- I	80040	R I	42075	8-I	Springfield Ill	$I.00
8- 5	93649	DTI	I8080	8-2	Fredrick Md	I.00
8-6	93648	S P	I5750	8-5	"	I.00
8-6	93547	S P	24398	8-5	"	I.00
8-6	93689	C P	247287	8-2	"	I.00
8-6	93688	Pa	37188	8-2	"	I.00
8-6	57509	CNW	I26882	8-5	Des Moines Ia	I.00
8-7	80289	Pa	505545	8-7	Fostoria Ohio	I.00
8-7	80295	GAO	761	8-7	"	I.00
8-7	80292	Pa	572725	8-7	"	I.00
8-7	80290	RI	I42555	8-7	"	I.00
8-7	80291	R I	I40420	8-7	"	I.00
8-8	93686	R I	I40561	8-7	Frederick Md	I.00
8-8	93687	R I	I40369	8-7	"	I.00
8-8	93689	R I	45765	8-7	"	I.00
8-7	93653	R I	I42378	8-7	Millsdale Mich	I.00
8-7	93654	R I	I42220	8-7	"	I.00
8-7	93657	R I	I41865	8-7	"	I.00
8-7	93656	MPTD	410	8-7	"	I.00
8-7	93665	PM	83152	8-7	"	I.00
8-9	93743	CP	246740	8-9	Fredrick Md	I.00
8-9	93742	NYC	95817	8-9	"	I.00
8-9	93744	STLSM	8202	8-9	"	I.00
8-7	93652	OMA	34030	8-7	Massillon Ohio	I.00
8-10	93785	SP	27236	8-10	Millsdale Mich	I.00
8-10	93784	Mo	82686	8-10	"	I.00
8-10	93783	Pa	564498	8-10	"	I.00
8-10	93782	Pa	565811	8-10	"	I.00
8-10	93780	MC	80327	8-10	"	I.00
8-10	93781	SAL	I6665	8-10	"	I.00
8-13	93843	R I	I42097	8-12	"	I.00
8-13	93844	R I	I40109	8-12	"	I.00
8-13	93845	NYC	96083	8-12	"	I.00
8-13	93841	R I	I40518	8-12	"	I.00
8-13	93842	R I	I41785	8-12	"	I.00
8-13	59176	R I	I40641	8-12	Davenport Ia	I.00
8-13	59177	CP	241910	8-12	"	I.00
8-12	59047	R I	41467	8-12	Des Moines Ia	I.00
8-13	65170	R I	44036	8-13	Massillon Ohio	I.00
8-13	59330	R I	I40258	8-13	Davenport Ia	I.00
8-13	59329	R I	I41754	8-13	"	I.00
8-13	59327	R I	I40494	8-13	"	I.00
8-15	80708	PWO	32850	8-15	Milwaukee Wis	I.00
8-15	80739	RIP	61049	8-15	"	I.00

8-5	93547	S P	24398	8-5	"	I.00
8-6	93489	C P	247227	8-2	"	I.00
8-6	93486	Pa	37188	8-2	"	I.00
8-6	57509	CNW	I26882	8-5	"	I.00
8-7	80289	Pa	503545	8-7	Des Moines Ia	I.00
8-7	80295	CAO	761	8-7	Postoria Ohio	I.00
8-7	80292	Pa	572725	8-7	"	I.00
8-7	80290	RI	I42555	8-7	"	I.00
8-7	80291	R I	I40420	8-7	"	I.00
8-8	93686	R I	I40561	8-7	"	I.00
8-8	93687	R I	I40369	8-7	Frederick Md	I.00
8-8	93689	R I	45765	8-7	"	I.00
8-7	93653	R I	I42378	8-7	"	I.00
8-7	93654	R I	I42220	8-7	Millsdale Mich	I.00
8-7	93657	R I	I41865	8-7	"	I.00
8-7	93656	MPYD	410	8-7	"	I.00
8-7	93655	RM	83152	8-7	"	I.00
8-9	93743	CP	246740	8-9	"	I.00
8-9	93742	NYC	95817	809	Fredrick Md	I.00
8-9	93744	STLRM	3202	8-9	"	I.00
8-7	93652	OMA	34030	8-7	"	I.00
8-10	93785	SP	27236	8-10	Massillon Ohio	I.00
8-10	93784	Mo	82686	8-10	Millsdale Mich	I.00
8-10	93783	Pa	564498	8-10	"	I.00
8-10	93782	Pa	565511	8-10	"	I.00
8-10	93780	MC	80327	8-10	"	I.00
8-10	53781	SAL	I6665	8-10	"	I.00
8-13	93843	R I	I42097	8-12	"	I.00
8-13	93844	R I	I40109	8-12	"	I.00
8-13	93845	NYC	95085	8-12	"	I.00
8-13	93841	R I	I40518	8-12	"	I.00
8-13	93842	R I	I41785	8-12	"	I.00
8-13	59176	R I	I40641	8-12	Davenport Ia	I.00
8-13	59177	CP	241910	8-12	"	I.00
8-12	59047	R I	41467	8-12	Des Moines Ia	I.00
8-13	65170	R I	44036	8-13	Massillon Ohio	I.00
8-13	59520	R I	I40288	8-13	Davenport Ia	I.00
8-13	59529	R I	I41754	8-13	"	I.00
8-13	58527	R I	I40494	8-13	"	I.00
8-15	80708	PWO	32850	8-15	Milwaukee Wis	I.00
8-15	80737	BAR	61049	8-15	"	I.00
8-15	80709	R I	45890	8-15	"	I.00
8-16	93929	R I	I57827	8-16	Cleveland Ohio	I.00
8-16	93978	R I	44870	8-16	Massillon "	I.00
8-16	80772	CNW	54768	8-16	Milwaukee Wis	I.00

48.00

Statement of cars coopered for bulk grain loading at Kansas City, Mo-Kansas- August 1935 account Simonds-Shields-Lonsdale Grain Company

Waybill Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charge
8-16	80773	R I	40807	8-16	Milwaukee Wis	$1.00
~~8-21~~	~~[illegible]~~	~~R I~~	~~I[illegible]70~~	~~8-19~~	~~Iowa Park Texy~~	~~[illegible]~~
8-19	94084	LN	I2212	8-19	Fredrick Md	I.00
8-19	[illegible]	R I	I41266	8-19	"	I.00
8-19	94082	B&O	277554	8-19	"	I.00
8-19	94080	SL	I36610	8-19	Massillon Ohio	I.00
8-19	80867	RI	I55544	8-19	Milwaukee Wis	I.00
8-19	80868	MP	I1557	8-19	"	I.00
8-19	40656	CO	8280	8-19	Des Moines Ia	I.00
8-20	94145	R I	I42747	8-19	Hillsdale Mich	I.00
8-20	94141	CP	246091	8-19	"	I.00
8-20	94142	SP	26946	8-19	"	I.00
8-20	94146	B4	58853	8-19	Fredrick Md	I.00
8-20	94147	NYC	99547	8-19	"	I.00
8-20	94148	R I	I40819	8-19	"	I.00
8-20	94143	B4	56011	8-19	Hillsdale Mich	I.00
8-20	94144	R I	I41409	8-19	"	I.00
8-21	94193	R I	I42978	8-21	Fredrick Md	I.00
8-21	94194	R I	I40118	8-21	"	I.00
8-22	94231	R I	I42856	8-21	"	I.00
8-22	94342	R I	I40725	8-21	"	I.00
8-22	94230	MM	505090	8-21	"	I.00
8-21	41145	MSTL	24822	8-21	Des Moines Ia	I.00
8-23	41788	R I	I42854	8-21	Davenport Ia	I.00
8-23	41787	R I	I40879	8-21	"	I.00
8-22	94238	GH	414998	8-22	Detroit Mich	I.00
8-22	94239	IC	I56547	8-22	"	I.00
8-24	41975	R I	44299	8-23	Enid, Okla	I.00
8-24	[illegible]	R I	43369	8-23	"	I.00
8-24	41973	R I	46092	8-23	"	I.00
8-24	41972	TH0	51809	8-23	"	I.00
8-24	42065	R I	I42565	8-23	Davenport Ia	I.00
8-24	42064	R I	I40799	8-23	"	I.00
8-24	91293	R I	I41406	8-23	Fredrick Md	I.00
8-24	91292	R I	I40254	8-23	"	I.00
8-24	42066	R I	I40262	8-23	Davenport Ia	I.00
8-24	67109	SL	38460	8-23	Harrisonburg Va	I.00
8-24	41971	R I	40776	8-23	Enid, Okla	I.00
8-24	41970	R I	42414	8-23	"	I.00
8-24	42264	R I	43364	8-23	"	I.00
8-24	41968	S P	30209	8-23	"	I.00
8-26	42344	R I	40124	8-23	Davenport Ia	I.00
8-24	94291	R I	42749	8-24	Massillon Ohio	I.00
8-26	94346	R I	44626	8-26	"	I.00

8-19	94084	LH	I2212	8-19	Fredrick Md	I.00
8-19	94083	R I	I4I266	8-19	"	I.00
8-19	94082	B&O	277554	8-19	"	I.00
8-19	94080	SL	I38410	8-19	Massillon Ohio	I.00
8-19	80867	RI	I55544	8-19	Milwaukee Wis	I.00
8-19	80868	NP	I1557	8-19	"	I.00
8-19	40656	CO	8280	8-19	Des Moines Ia	I.00
8-20	94I45	R I	I42747	8-19	Hillsdale Mich	I.00
8-20	94I4I	CP	244091	8-19	"	I.00
8-20	94I42	EP	26946	8-19	"	I.00
8-20	94I46	B4	56853	8-19	Fredrick Md	I.00
8-20	94I47	NYC	99547	8-19	"	I.00
8-20	94I48	R I	I40819	8-19	"	I.00
8-20	94I43	B4	56011	8-19	Hillsdale Mich	I.00
8-20	94I44	R I	I4I409	8-19	"	I.00
8-2I	94I93	R I	I42078	8-2I	Fredrick Md	I.00
8-2I	94I94	R I	I40II8	8-2I	"	I.00
8-22	9423I	R I	I42856	8-2I	"	I.00
8-22	94342	R I	I80725	8-2I	"	I.00
8-22	94230	MN	505090	8-2I	"	I.00
8-2I	4II45	MSTL	24822	8-2I	Des Moines Ia	I.00
8-23	4I788	R I	I42854	8-2I	Davenport Ia	I.00
8-23	4I787	R I	I40879	8-2I	"	I.00
8-22	94228	GM	4I4998	8-22	Detroit Mich	I.00
8-22	94229	IC	I55547	8-22	"	I.00
8-24	4I975	R I	44299	8-23	Enid,Okla	I.00
8-24	43808	R I	43369	8-23	"	I.00
8-24	4I973	R I	46092	8-23	"	I.00
8-24	4I972	TMO	51809	8-23	"	I.00
8-24	42065	R I	I42565	8-23	Davenport Ia	I.00
8-24	42084	R I	I40799	8-23	"	I.00
8-24	9I293	R I	I4I406	8-23	Fredrick Md	I.00
8-24	9I292	R I	I40254	8-23	"	I.00
8-24	42056	R I	I80362	8-23	Davenport Ia	I.00
8-24	67I09	SL	38460	8-23	Harrisonburg Va	I.00
8-24	4I97I	R I	40776	8-23	Enid,Okla	I.00
8-24	4I970	R I	43II4	8-23	"	I.00
8-24	43264	R I	43264	8-23	"	I.00
8-24	4I968	S P	30209	8-23	"	I.00
8-24	42344	R I	I40I24	8-23	Davenport Ia	I.00
8-24	94291	R I	42749	8-24	Massillon Ohio	I.00
8-26	94346	R I	44626	8-26	"	I.00
8-27	94376	R I	I42812	8-26	Frederick Md	I.00
8-27	94375	CP	244357	8-26	"	I.00
8-27	94374	B4	57339	8-26	"	I.00
8-27	42468	Pa	55058	8-24	Davenport Ia	I.00
8-27	42469	R I	I40222	8-26	Enid,Okla	I.00
8-27	42466	R I	45932	8-26	"	I.00
8027	42465	R I	44734	8-26	"	I.00
8-27	42464	R				50.00

Statement of cars coopersd for bulk grain loading at Kansas City, Mo-Kansas August 1935 for account of Simonds Shields Lonsdale Grain Co-

Waybill Date	Number	Car Initial	Number	Date Coopered	Destination	Coopering Charge
8-27	42464	R I	4II50	8-26	Enid, Okla	$I.00
8-27	42463	R I	4342I	8-26	"	I.00
8-27	42462	R I	44844	8-26	"	I.00
8-27	42688	R I	44086	8-26	"	I.00
8-27	42687	R I	44265	8-27	"	I.00
8-29	43301	MSTL	I8250	8-29	Des Moines Ia	I.00
8-29	94477	ERIE	90I24	8-29	Massillon Ohio	I.00
8-30	42462	PM	83034	8-29	Des Moines Ia	I.00
8-30	8I428	LA	I2047	8-29	Noblesville Ind	I.00
8-30	8I429	FMO	32I42	8-29	"	I.00
8-3I	8I44I	PM	83448	8-30	"	I.00
8-30	4346I	B4	58063	8-30	Davenport Ia	I.00
8-30	43460	R I	I42525	8-30	"	I.00
8-3I	43854	CP	230525	8-30	"	I.00
8-3I	43855	NYC	96I56	8-30	"	I.00
8-3I	94537	PM	89045	8-3I	Massillon Ohio	I.00
8-3I	94540	ATSF	228543	8-30	Nashville Tenn	I.00
8-3I	94538	CNW	I0I752	8-30	"	I.00
8-3I	9454I	MILW	7I2924	8-30	"	I.00
8-3I	94539	FMO	3I828	8-30	"	I.00
~~9-4~~	~~88854~~	~~R I~~	~~I48I58~~	~~Enid~~	~~8-3I~~	~~Spoonbread M~~	~~$I.00~~

Statement of cars coopered for bulk grain loading at Kansas City, Mo., Kans. during the month of September 1935 for the account of Simonds-Shields-Lonsdale Co.

19-20

WAYBILL DATE	WAYBILL NUMBER	CAR INITIAL	CAR NUMBER	DATE COOPERED	DESTINATION	COOPERING CHARGES
9-3	81550	CRIP	45126	9-3	Milwaukee, Wisc.	$1.00
9-3	81549	NP	14524	9-3	"	$1.00
9-3	81548	PM	33628	9-3	"	$1.00
9-3	81547	CRIP	44638	9-3	"	$1.00
9-3	81546	CP	138284	9-3	"	$1.00
9-3	81555	CRIP	46177	9-3	"	$1.00
9-3	81554	CRIP	44842	9-3	"	$1.00
9-3	81553	CRIP	15311	9-3	"	$1.00
9-3	81552	CRIP	43141	9-3	"	$1.00
9-3	81551	CRIP	41590	9-3	"	$1.00
9-4	94642	CRIP	141766	9-3	Hillsdale, Mich.	$1.00
9-4	94641	CN	510951	9-3	"	$1.00
9-4	94640	CRIP	140356	9-3	"	$1.00
9-4	94639	CN	508212	9-3	"	$1.00
9-4	94638	CRIP	141398	9-3	"	$1.00
9-4	94637	CNW	100918	9-3	"	$1.00
9-4	94636	NP	29965	9-3	"	$1.00
9-4	81562	CRIP	44111	9-3	Milwaukee, Wisc.	$1.00
9-5	44870	CRIP	41458	9-4	Enid, Okla.	$1.00
9-5	44869	CRIP	42680	9-4	"	$1.00
9-5	44868	CRIP	141126	9-4	"	$1.00
9-5	44867	CRIP	140114	9-4	"	$1.00
9-5	44866	CRIP	142922	9-4	"	$1.00
9-5	44865	CRIP	140658	9-4	"	$1.00
9-5	44864	CRIP	141673	9-4	"	$1.00
9-4	81634	SOO	38296	9-4	Milwaukee, Wisc.	$1.00
9-5	44872	CRIP	142872	9-5	Enid, Okla.	$1.00
9-6	81718	CRIP	42826	9-5	Milwaukee, Wisc.	$1.00
9-5	44871	CRIP	42926	9-5	Des Moines, Ia.	$1.00
9-5	81690	CNW	138702	9-5	Milwaukee, Wisc.	$1.00
9-5	81689	CNW	109804	9-5	"	$1.00
9-5	81688	CN	416220	9-5	"	$1.00
9-5	81687	CRIP	42723	9-5	"	$1.00
9-5	81686	CRIP	43603	9-5	"	$1.00
9-7	81783	CRIP	156064	9-6	"	$1.00
9-7	45567	CRIP	142520	9-6	Davenport, Iowa.	$1.00
9-7	81782	CRIP	45079	9-6	Milwaukee, Wisc.	$1.00
9-9	45923	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

WAYBILL DATE	WAYBILL NUMBER	CAR INITIAL	CAR NUMBER	DATE COOPERED	DESTINATION	COOPERING CHARGES
9-3	81550	CRIP	45126	9-3	Milwaukee, Wisc.	$1.00
9-3	81549	MP	14524	9-3	"	$1.00
9-3	81548	PM	33628	9-3	"	$1.00
9-3	81547	CRIP	44638	9-3	"	$1.00
9-3	81546	CP	138284	9-3	"	$1.00
9-3	81555	CRIP	46177	9-3	"	$1.00
9-3	81554	CRIP	44842	9-3	"	$1.00
9-3	81553	CRIP	45311	9-3	"	$1.00
9-3	81552	CRIP	43141	9-3	"	$1.00
9-3	81551	CRIP	41590	9-3	"	$1.00
9-4	94642	CRIP	141766	9-3	Hillsdale, Mich.	$1.00
9-4	94641	CN	510951	9-3	"	$1.00
9-4	94640	CRIP	140356	9-3	"	$1.00
9-4	94639	CN	508212	9-3	"	$1.00
9-4	94638	CRIP	141398	9-3	"	$1.00
9-4	94637	CNW	100918	9-3	"	$1.00
9-4	94636	MP	29965	9-3	"	$1.00
9-4	81562	CRIP	44111	9-3	Milwaukee, Wisc.	$1.00
9-5	44870	CRIP	41458	9-4	Enid, Okla.	$1.00
9-5	44869	CRIP	42680	9-4	"	$1.00
9-5	44868	CRIP	141126	9-4	"	$1.00
9-5	44867	CRIP	140114	9-4	"	$1.00
9-5	44866	CRIP	142922	9-4	"	$1.00
9-5	44865	CRIP	140658	9-4	"	$1.00
9-5	44864	CRIP	141673	9-4	"	$1.00
9-4	81634	SOO	38296	9-4	Milwaukee, Wisc.	$1.00
9-5	44872	CRIP	142872	9-5	Enid, Okla.	$1.00
9-6	81718	CRIP	42826	9-5	Milwaukee, Wisc.	$1.00
9-5	44871	CRIP	42926	9-5	Des Moines, Ia.	$1.00
9-5	81690	CNW	138702	9-5	Milwaukee, Wisc.	$1.00
9-5	81689	CNW	109804	9-5	"	$1.00
9-5	81688	CN	416220	9-5	"	$1.00
9-5	81687	CRIP	43723	9-5	"	$1.00
9-5	81686	CRIP	43603	9-5	"	$1.00
9-7	81783	CRIP	156064	9-6	"	$1.00
9-7	45567	CRIP	142520	9-6	Davenport, Iowa.	$1.00
9-7	81782	CRIP	45079	9-6	Milwaukee, Wisc.	$1.00
9-9	45923	NKP	13543	9-6	Davenport, Iowa.	$1.00
9-10	94906	CRIP	40748	9-9	Massillon, Ohio.	$1.00
9-10	46238	BO	271457	9-9	Davenport, Iowa.	$1.00
9-10	46036	CP	246042	9-9	"	$1.00
9-10	46035	CRIP	141356	9-9	"	$1.00
9-10	46237	CRIP	142440	9-9	"	$1.00
9-10	46247	CRIP	141397	9-9	"	$1.00
9-10	46246	MC	81847	9-9	"	$1.00
9-10	46245	Penn	121022	9-9	"	$1.00
9-10	46244	CRIP	141429	9-9	"	$1.00
9-10	46243	CP	429238	9-9	"	$1.00
~~9-10~~	~~46242~~	~~Misc.~~				

21-22

Statement of cars coopered for bulk grain loading at Kansas City, Mo., Kans. during the month of September 1935 for the account of Simonds-Shields-Lonsdale Co.

WAYBILL Date	WAYBILL Number	Car INITIAL	Car NUMBER	DATE COOPERED	DESTINATION	COOPERING CHARGES.
9-10	46242	WStL	18180	9-9	Davenport,Ia.	$1.00
9-10	46241	CP	244001	9-10	"	$1.00
9-10	46240	CRIP	140309	9-10	"	$1.00
9-10	46239	DLW	48435	9-10	"	$1.00
9-12	95033	CRIP	45655	9-11	Massillon,Ohio.	$1.00
9-12	46681	BO	265059	9-11	Des Moines,Ia.	$1.00
9-12	95020	CNW	109124	9-11	Battle Creek,Mic	$1.00
9-16	47761	CP	241859	9-16	Des Moines,Ia.	$1.00
9-16	95192	BO	278253	9-16	Massillon,Ohio.	$1.00
9-18	95235	CRIP	46170	9-17	"	$1.00
9-19	48637	CRIP	45478	9-19	Yukon,Okla.	$1.00
9-19	48636	CRIP	155758	9-19	"	$1.00
9-23	49347	CRIP	141966	9-19	"	$1.00
9-20	95384	CNJ	21504	9-20	Frederick,Md.	$1.00
9-20	95388	Oma	58590	9-20	"	$1.00
9-20	95387	CRIP	141517	9-20	"	$1.00
9-20	95385	CP	247057	9-20	"	$1.00
9-20	95386	BO	275484	9-20	"	$1.00
9-23	49461	GN	31331	9-20	Davenport,Ia.	$1.00
9-23	49460	BO	278244	9-23	"	$1.00
9-23	95460	Oma	36568	9-23	Massillon,Ohio.	$1.00
9-24	49725	GN	9186	9-24	Des Moines,Ia.	$1.00
9-24	95510	PM	81692	9-24	Massillon,Ohio.	$1.00
9-26	50476	SP	88048	9-26	Enid, Okla.	$1.00
9-26	50475	CRIP	41825	9-26	"	$1.00
9-26	50474	CRIP	44633	9-26	"	$1.00
9-26	50473	CRIP	46139	9-26	"	$1.00
9-30	51394	PM	83233	9-30	Davenport,Ia.	$1.00
10-2	51939	SAL	15260	9-30	"	$1.00
10-2	52069	CRIP	141866	9-30	"	$1.00
10-1	51739	CRIP	141657	9-30	"	$1.00
10-1	51738	CRIP	140418	9-30	"	$1.00
10-2	52068	CRIP	140440	9-30	"	$1.00
9-17	48021	CMStP&P	706028	9-11	"	$1.00
9-17	48023	"	713923	9-11	"	$1.00
9-17	48021	"	702403	9-13	"	$1.00

Used for the account of Simmons-Shields-Lonsdale Co.

WAYBILL Date	WAYBILL Number	Car INITIAL	Car NUMBER	DATE COOPERED	DESTINATION	COOPERING CHARGES.
9-10	46242	WStL	18180	9-9	Davenport, Ia.	$1.00
9-10	46241	CP	244001	9-10	"	$1.00
9-10	46240	CRIP	140309	9-10	"	$1.00
9-10	46239	DLW	48435	9-10	"	$1.00
9-12	95035	CRIP	45653	9-11	Massillon, Ohio.	$1.00
9-12	46681	BO	265059	9-11	Des Moines, Ia.	$1.00
9-12	95020	CNW	109124	9-11	Battle Creek, Mic	$1.00
9-16	47761	CP	241859	9-16	Des Moines, Ia.	$1.00
9-16	95192	BO	278253	9-16	Massillon, Ohio.	$1.00
9-18	95235	CRIP	46170	9-17	"	$1.00
9-19	48637	CRIP	45478	9-19	Yukon, Okla.	$1.00
9-19	48636	CRIP	155758	9-19	"	$1.00
9-23	49347	CRIP	141966	9-19	"	$1.00
9-20	95384	CNJ	21504	9-20	Frederick, Md.	$1.00
9-20	95388	Oma	58590	9-20	"	$1.00
9-20	95387	CRIP	141517	9-20	"	$1.00
9-20	95385	CP	247057	9-20	"	$1.00
9-20	95386	BO	275484	9-20	"	$1.00
9-23	49461	GN	31331	9-20	Davenport, Ia.	$1.00
9-23	49460	BO	278244	9-23	"	$1.00
9-23	95468	Oma	36568	9-23	Masillon, Ohio.	$1.00
9-24	49725	GN	9126	9-24	Des Moines, Ia.	$1.00
9-24	95510	PM	81692	9-24	Massillon, Ohio.	$1.00
9-26	50476	SP	88048	9-26	Enid, Okla.	$1.00
9-26	50475	CRIP	41825	9-26	"	$1.00
9-26	50474	CRIP	44633	9-26	"	$1.00
9-26	50473	CRIP	46139	9-26	"	$1.00
9-30	51394	PM	83233	9-30	Davenport, Ia.	$1.00
10-2	51939	SAL	15260	9-30	"	$1.00
10-2	52069	CRIP	141866	9-30	"	$1.00
10-1	51739	CRIP	141657	9-30	"	$1.00
10-1	51738	CRIP	140418	9-30	"	$1.00
10-2	52068	CRIP	140440	9-30	"	$1.00
9-17	48022	CMStP&P	706022	9-11	"	$1.00
9-17	48023	"	713923	9-11	"	$1.00
9-17	48021	"	702403	9-13	"	$1.00
9-16	47762	"	701515	9-13	"	$1.00
9-5	94710	MP	46735	9-4	Nashville, Tenn.	$1.00
9-5	94709	CBQ	117298	9-4	"	$1.00
9-5	94708	MP	21774	9-4	"	$1.00
9-6	94707	CRIP	40710	9-4	"	$1.00
9-6	94731	ATSF	116842	9-4	"	$1.00
9-5	94728	ATSF	118613	9-4	"	$1.00
9-6	94729	ATSF	117277	9-4	"	$1.00
9-6	94730	ATSF	118875	9-4	"	$1.00
9-7	94780	MP	47036	9-6	"	$1.00
9-7	94777	CRI	6366	9-6	"	$1.00
9-7	94778	CBQ	113798	9-6	"	$1.00

18.00

Statement of cars coopered for bulk grain loading at Kansas City, Mo., Kans. during the month of September 1935 for the account of Simonds-Shields-Lonsdale Co.

WAYBILL DATE	WAYBILL NUMBER	CAR INITIAL	CAR NUMBER	DATE COOPERED	DESTINATION	COOPERING CHARGES.
9-7	94779	CBQ	II7780	9-6	Nashville, Tenn.	$1.00
9-9	94819	MP	41011	9-6	"	$1.00
9-9	94820	MP	45660	9-6	"	$1.00
9-9	94821	MP	29584	9-6	"	$1.00
9-9	94822	MP	28233	9-6	"	$1.00
9-10	94910	MP	137746	9-6	"	$1.00
9-10	94909	MP	12785	9-6	"	$1.00
9-10	94908	MP	135274	9-6	"	$1.00
9-10	94907	CMStP&P	716916	9-6	"	$1.00
9-11	94961	MP	10098	9-10	"	$1.00
9-11	94960	MP	22958	9-10	"	$1.00
9-11	94963	TP	60154	9-10	"	$1.00
9-11	94962	CP	129214	9-10	"	$1.00
9-11	95019	MP	12484	9-10	"	$1.00
9-11	95018	MP	26126	9-10	"	$1.00
9-13	95060	CMStP&P	706455	9-10	"	$1.00
9-12	95017	MP	24659	9-10	"	$1.00
9-13	95063	MP	47907	9-10	"	$1.00
9-12	95016	CBQ	132659	9-10	"	$1.00
9-13	95061	CBQ	108261	9-10	"	$1.00
9-13	95062	CMStP&P	712256	9-10	"	$1.00
9-14	95098	ATSF	232708	9-12	"	$1.00
9-14	95099	ATSF	46257	9-12	"	$1.00
9-14	95100	MP	74137	9-13	"	$1.00
9-14	95101	MP	136287	9-13	"	$1.00
9-16	95164	CNW	124762	9-14	"	$1.00
9-16	95162	UP	126404	9-14	"	$1.00
9-16	95163	MP	120321	9-14	"	$1.00
9-16	95161	MP	19229	9-14	"	$1.00

$99.00

Statement of cars coopered for bulk grain loading at Kansas City, Mo.-Kans. during the month of Oct. 1935 for the account of Simonds-Shields-Lonsdale Grain Co. 25-26

Waybill Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charge
10-2	52065	RI	140236	10-2	Davenport, Ia.	$1.00
10-2	52064	RI	43111	10-2	DO	1.00
10-2	52063	RI	41357	10-2	DO	1.00
10-2	95854	RI	42261	10-2	Massillon, Ohio	1.00
10-2	52062	RI	141236	10-2	Davenport, Ia.	1.00
10-2	52067	RI	41878	10-2	DO	1.00
10-2	52066	RI	44091	10-2	DO	1.00
10-2	74456	RI	142748	10-2	Hillsdale, Mich.	1.00
10-2	95850	RI	140293	10-2	DO	1.00
10-2	95851	RI	141038	10-2	DO	1.00
10-2	95853	RI	140158	10-2	DO	1.00
10-2	95852	RI	141936	10-2	DO	1.00
10-3	52350	RI	141336	10-3	Des Moines, Ia.	1.00
10-3	52349	RI	43132	10-3	DO	1.00
10-3	95904	RI	43028	10-3	Londonville, Ohio	1.00
10-5	52919	RI	41789	10-4	Yukon, Okla.	1.00
10-5	52918	RI	43020	10-4	DO	1.00
10-8	53422	RI	140024	10-4	DO	1.00
10-8	96049	CP	245733	10-8	Lockport, N.Y.	1.00
10-9	96105	RI	141899	10-8	DO	1.00
10-8	53604	RI	140464	10-8	Davenport, Ia.	1.00
10-8	53605	RI	142008	10-8	DO	1.00
10-11	54519	RI	141212	10-8	DO	1.00
10-10	96144	RI	44857	10-8	Lockport, N.Y.	1.00
10-10	96146	RI	45651	10-10	Knoxville, Tenn	1.00
10-10	96145	RI	44098	10-10	DO	1.00
10-14	96257	[illegible]	133456	10-14	Massillon, Ohio	1.00
10-14	55036	RI	46074	10-14	Des Moines, Ia.	1.00
10-16	55545	RI	141915	10-15	DO	1.00
10-16	55544	RI	142720	10-15	DO	1.00
10-16	55750	RI	141908	10-16	Davenport, Ia.	1.00
10-16	55751	RI	141174	10-16	DO	1.00
~~10-22~~	~~96057~~	~~RI~~	~~142176~~	~~10-18~~	~~Feeders Supply Co.~~	~~2.25~~
~~10-21~~	~~96058~~	~~RI~~	~~140798~~	~~10-18~~	~~Midland Mills~~	~~2.25~~
~~10-23~~	~~DO~~	~~[illegible]~~	~~95434~~	~~10-18~~	~~DO~~	~~2.25~~
~~10-23~~	~~DO~~	~~RI~~	~~142601~~	~~10-18~~	~~DO~~	~~2.25~~
~~10-20~~	~~96059~~	~~RI~~	~~140466~~	~~10-21~~	~~DO~~	~~2.25~~
~~10-25~~	~~DO~~	~~RI~~	~~142109~~	~~10-21~~	~~DO~~	~~2.25~~
~~10-25~~	~~DO~~	~~RI~~	~~141601~~	~~10-21~~	~~DO~~	~~2.25~~
10-21	77864	RI	45576	10-21	Battle Creek, Mich.	1.00
10-21	56884	RI	142904	10-21	Okla. City, Okla.	1.00

Waybill Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charge
10-2	52065	RI	140236	10-2	Davenport, Ia.	$1.00
10-2	52064	RI	43111	10-2	DO	1.00
10-2	52063	RI	41357	10-2	DO	1.00
10-2	95854	RI	42261	10-2	Massillon, Ohio	1.00
10-2	52062	RI	141236	10-2	Davenport, Ia.	1.00
10-2	52067	RI	41878	10-2	DO	1.00
10-2	52066	RI	44091	10-2	DO	1.00
10-2	74456	RI	142748	10-2	Hillsdale, Mich.	1.00
10-2	95850	RI	140293	10-2	DO	1.00
10-2	95851	RI	141038	10-2	DO	1.00
10-2	95853	RI	140158	10-2	DO	1.00
10-2	95852	RI	141936	10-2	DO	1.00
10-3	52350	RI	141336	10-3	Des Moines, Ia.	1.00
10-3	52349	RI	43132	10-3	DO	1.00
10-3	95904	RI	43028	10-3	Londonville, Ohio	1.00
10-5	52919	RI	41789	10-4	Yukon, Okla.	1.00
10-5	52918	RI	43020	10-4	DO	1.00
10-8	53422	RI	140024	10-4	DO	1.00
10-8	96049	CP	245733	10-8	Lockport, N.Y.	1.00
10-9	96105	RI	141899	10-8	DO	1.00
10-8	53604	RI	140464	10-8	Davenport, Ia.	1.00
10-8	53605	RI	142008	10-8	DO	1.00
10-11	54519	RI	141212	10-8	DO	1.00
10-10	96144	RI	44857	10-8	Lockport, N.Y.	1.00
10-10	96146	RI	45651	10-10	Knoxville, Tenn	1.00
10-10	96145	RI	44098	10-10	DO	1.00
10-14	96257	[illegible]	133456	10-14	Massillon, Ohio	1.00
10-14	55036	RI	46074	10-14	Des Moines, Ia.	1.00
10-16	55545	RI	141915	10-15	DO	1.00
10-16	55544	RI	142720	10-15	DO	1.00
10-16	55750	RI	141908	10-16	Davenport, Ia.	1.00
10-16	55751	RI	141174	10-16	DO	1.00
~~10-22~~	~~98857~~	~~RI~~	~~142176~~	~~10-18~~	~~Feedere Supply Co.~~	~~2.25~~ #
~~10-23~~	~~98858~~	~~RI~~	~~140708~~	~~10-18~~	~~Midland Mills~~	~~2.25~~
~~10-23~~	~~DO~~	~~WLE~~	~~95434~~	~~10-18~~	~~DO~~	~~2.25~~
~~10-23~~	~~DO~~	~~RI~~	~~142601~~	~~10-18~~	~~DO~~	~~2.25~~
~~10-20~~	~~98859~~	~~RI~~	~~140468~~	~~10-21~~	~~DO~~	~~2.25~~
~~10-25~~	~~DO~~	~~RI~~	~~140180~~	~~10-21~~	~~DO~~	~~2.25~~
~~10-25~~	~~DO~~	~~RI~~	~~141681~~	~~10-21~~	~~DO~~	~~2.25~~
10-21	77864	RI	45576	10-21	Battle Creek, Mich.	1.00
10-21	56884	RI	142904	10-21	Okla. City, Okla.	1.00
10-21	56882	RI	45077	10-21	DO	1.00
10-21	56883	RI	45734	10-21	DO	1.00
10-22	57141	RI	140979	10-21	Davenport, Ia.	1.00
10-21	56880	RI	141831	10-21	DO	1.00
						3[illegible].00

Simonds-Shields-Lonsdale Grain Co. Oct.1935

Waybill Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charge
10-21	56879	RI	140225	10-21	Davenport, Ia.	$1.00
10-21	56881	RI	140780	10-21	DO	1.00
10-22	57140	WLE	25840	10-21	DO	1.00
10-23	57268	NYC	99590	10-21	DO	1.00
10-23	57269	RI	140560	10-21	DO	1.00
10-23	57270	RI	141843	10-21	DO	1.00
10-22	57139	RI	46119	10-22	Des Moines, Ia.	1.00
10-28	96710	RI	141164	10-24	Frederick, Md.	1.00
10-28	96709	RI	140690	10-24	DO	1.00
10-25	96676	RI	140106	10-24	DO	1.00
10-25	96677	RI	141838	10-24	DO	1.00
10-25	96678	RI	142967	10-24	DO	1.00
10-26	96505	RI	141534	10-25	Hillsdale, Mich	1.00
10-26	96564	RI	141846	10-25	DO	1.00
10-26	96563	RI	142901	10-25	DO	1.00
10-26	96562	CP	241301	10-25	DO	1.00
10-26	96561	CN	133168	10-25	DO	1.00
~~10-28~~	~~96560~~	~~RI~~	~~141468~~	~~10-28~~	~~Milw. Elevator~~	~~0.25~~
10-30	96833	B-4	49306	10-30	Frederick, Md.	1.00
10-30	96834	CP	242257	10-30	DO	1.00
10-30	96835	NYC	98253	10-30	DO	1.00
11-1	59589	RI	141105	10-30	Okla. City, Okla.	1.00
11-1	59585	RI	142296	10-30	DO	1.00
11-1	59586	RI	140380	10-30	DO	1.00
11-1	59587	RI	142666	10-30	DO	1.00
11-1	59588	RI	142703	10-30	DO	1.00
~~10-3~~	~~910~~	~~B-4~~	~~57624~~	~~10-3~~	~~Crostown to MP~~	~~0.25~~
~~10-3~~	~~"~~	~~CP~~	~~10015~~	~~10-3~~	~~DO~~	~~0.25~~
~~10-3~~	~~"~~	~~CP~~	~~242781~~	~~10-3~~	~~DO~~	~~0.25~~
~~10-3~~	~~"~~	~~B-4~~	~~58008~~	~~10-3~~	~~DO~~	~~0.25~~
~~11-2~~	~~986~~	~~RI~~	~~140478~~	~~10-30~~	~~Crostown to Milw.~~	~~0.25~~
~~11-2~~	~~"~~	~~RI~~	~~142780~~	~~10-30~~	~~DO~~	~~0.25~~

25.00

$----Crostown Cars.

Statement of cars coopered for bulk grain loading at Kansas City Mo-Kans during month of Nov 1935 for account of Simonds-Shields-Lonsdale Grain Co.

Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charges
11-4	40316	RI	140954	11-4	Des Moines Ia	$1.00
~~11-6~~	~~90661~~	~~RI~~	~~141849~~	~~11-6~~	~~Midland Mills~~	~~0.25~~ #
~~11-6~~	~~90661~~	~~RI~~	~~142667~~	~~11-6~~	~~Do~~	~~0.25~~ #
~~11-6~~	~~90661~~	~~RI~~	~~142677~~	~~11-6~~	~~Do~~	~~0.25~~ #
~~11-6~~	~~90661~~	~~RI~~	~~140160~~	~~11-6~~	~~Do~~	~~0.25~~ #
~~11-6~~	~~90661~~	~~RI~~	~~141788~~	~~11-6~~	~~Do~~	~~0.25~~ #
11-6	60769	RI	141818	11-6	Frederick Md.	1.00
11-6	60768	RI	140069	11-6	Do	1.00
11-6	90314	RI	140355	11-6	Hillsdale Mch	1.00
11-6	90313	RI	142872	11-6	Do	1.00
11-6	90312	RI	142726	11-6	Do	1.00
11-6	90311	RI	142072	11-6	Do	1.00
11-6	90310	RI	142555	11-6	Do	1.00
11-12	42229	MILW	716596	11-12	Des Moines Ia	1.00
11-12	42230	DRG	47481	11-12	Do	1.00
11-12	422 1	CN	507036	11-12	Do	1.00
11-12	42228	RI	41580	11-12	Do	1.00
11-14	42573	RI	140620	11-13	Enid Okla	1.00
11-14	42574	RI	140981	11-13	Do	1.00
11-14	42572	RI	140303	11-13	Do	1.00
11-14	42571	RI	141746	11-13	Do	1.00
11-14	42570	RI	141249	11-13	Do	1.00
11-16	90439	RI	140567	11-15	Hillsdale Mch	1.00
11-16	90440	RI	142877	11-15	Do	1.00
11-16	43160	RI	140169	11-15	Oklahoma City Ok	1.00
11-16	43161	RI	141758	11-15	Do	1.00
11-16	43162	RI	141291	11-15	Do	1.00
11-16	43163	RI	142129	11-15	Do	1.00
11-16	43164	RI	140107	11-15	Do	1.00
11-16	90441	RI	141873	11-15	Hillsdale Mch	1.00
11-16	90442	RI	140667	11-15	Do	1.00
11-16	90443	RI	142111	11-15	Do	1.00
11-15	43061	RI	43857	11-15	Enid Okla	1.00
11-15	43062	RI	46106	11-15	Do	1.00
11-15	43159	RI	44657	11-15	Do	1.00
11-20	90622	RI	141348	11-18	Frederick Md	1.00
11-19	90579	RI	140574	11-18	Do	1.00
11-19	90580	RI	141476	11-18	Do	1.00
11-20	90623	RI	45525	11-18	Do	1.00
11-20	90624	RI	41010	11-18	Do	1.00
11-23	44860	RI	141273	11-22	Oklahoma City Ok	1.00
11-23	44859	RI	140025	11-22	Do	1.00
11-23	44858	RI	140392	11-22	Do	1.00
11-23	44857	RI	140636	11-22	Do	1.00
11-23	44856	RI	141621	11-22	Do	1.00
11-22	44682	RI	142418	11-22	Enid Okla	1.00

Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charges
11-4	40316	RI	140954	11-4	Des Moines Ia	$1.00
~~11-6~~	~~90661~~	~~RI~~	~~141848~~	~~11-6~~	~~Midland Mills~~	~~2.25~~ #
~~11-6~~	~~90661~~	~~RI~~	~~140607~~	~~11-6~~	~~Do~~	~~2.25~~ #
~~11-6~~	~~90661~~	~~RI~~	~~142077~~	~~11-6~~	~~Do~~	~~2.25~~ #
~~11-6~~	~~90661~~	~~RI~~	~~140160~~	~~11-6~~	~~Do~~	~~2.25~~ #
~~11-6~~	~~90661~~	~~RI~~	~~141788~~	~~11-6~~	~~Do~~	~~2.25~~ #
11-6	60769	RI	141818	11-6	Frederick Md.	1.00
11-6	60768	RI	140069	11-6	Do	1.00
11-6	90314	RI	140355	11-6	Hillsdale Mch	1.00
11-6	90313	RI	142872	11-6	Do	1.00
11-6	90312	RI	142726	11-6	Do	1.00
11-6	90311	RI	142072	11-6	Do	1.00
11-6	90310	RI	142555	11-6	Do	1.00
11-12	42229	MILW	716596	11-12	Des Moines Ia	1.00
11-12	42230	DRG	47481	11-12	Do	1.00
11-12	422 1	CN	507036	11-12	Do	1.00
11-12	42228	RI	41580	11-12	Do	1.00
11-14	42573	RI	140620	11-13	Enid Okla	1.00
11-14	42574	RI	140981	11-13	Do	1.00
11-14	42572	RI	140303	11-13	Do	1.00
11-14	42571	RI	141746	11-13	Do	1.00
11-14	42570	RI	141249	11-13	Do	1.00
11-16	90439	RI	140567	11-15	Hillsdale Mch	1.00
11-16	90440	RI	142877	11-15	Do	1.00
11-16	43160	RI	140169	11-15	Oklahoma City Ok	1.00
11-16	43161	RI	141758	11-15	Do	1.00
11-16	43162	RI	141281	11-15	Do	1.00
11-16	43163	RI	142129	11-15	Do	1.00
11-16	43164	RI	140107	11-15	Do	1.00
11-16	90441	RI	141873	11-15	Hillsdale Mch	1.00
11-16	90442	RI	140667	11-15	Do	1.00
11-16	90443	RI	142111	11-15	Do	1.00
11-15	43061	RI	43857	11-15	Enid Okla	1.00
11-15	43062	RI	46106	11-15	Do	1.00
11-15	43159	RI	44657	11-15	Do	1.00
11-20	90622	RI	141248	11-18	Frederick Md	1.00
11-19	90579	RI	140574	11-18	Do	1.00
11-19	90580	RI	141476	11-18	Do	1.00
11-20	90623	RI	45525	11-18	Do	1.00
11-20	90624	RI	41010	11-18	Do	1.00
11-23	44860	RI	141273	11-22	Oklahoma City Ok	1.00
11-23	44859	RI	140025	11-22	Do	1.00
11-23	44858	RI	140392	11-22	Do	1.00
11-23	44857	RI	140636	11-22	Do	1.00
11-23	44856	RI	141621	11-22	Do	1.00
11-22	44682	48	142418	11-22	Enid Okla	1.00

41.00

Cross town

Sheet 2- Simonds-Shields-Lonsdale Grain Co. 31-32

Waybill Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charges
~~11-25~~	~~00000~~	~~GW~~	~~00000~~	~~11-25~~	~~Enid Okla~~	~~$2.00~~ #
~~11-25~~	~~00000~~	~~GW~~	~~000000~~	~~11-25~~	~~Do~~	~~2.00~~ #
~~11-25~~	~~00000~~	~~MP~~	~~00000~~	~~11-25~~	~~Do~~	~~2.00~~ #
~~11-25~~	~~00000~~	~~AV~~	~~000000~~	~~11-25~~	~~Do~~	~~2.00~~ #
~~11-25~~	~~00000~~	~~UP~~	~~000000~~	~~11-25~~	~~Do~~	~~2.00~~ #
~~11-25~~	~~00000~~	~~RI~~	~~000000~~	~~11-25~~	~~Do~~	~~2.00~~ #
~~11-25~~	~~00000~~	~~RI~~	~~000000~~	~~11-25~~	~~Do~~	~~2.00~~ #
~~11-25~~	~~00000~~	~~RI~~	~~000000~~	~~11-25~~	~~Do~~	~~2.00~~ #
11-26	45330	RI	141732	11-25	Enid Okla	1.00
11-26	45329	RI	141182	11-25	Do	1.00
11-26	45328	RI	142040	11-25	Do	1.00
11-26	45542	RI	44209	11-26	Do	1.00
11-29	~~00000~~	RI				
11-29	90911	RI	43561	11-29	Battle Creek Mc	1.00
11-20	62983	MILW	706462	11-19	Herington Kans	1.00
11-29	64386	MILW	708925	11-29	Greenwood Mo	1.00
~~11-29~~	~~00000~~	~~RI~~	~~000000~~	~~11-27~~	~~Ruby Patrick~~	~~2.00~~ #

7.-

Cross town

Statement of cars coopered for bulk grain loading at Kansas City, Mo., Kansas during the month of December 1934 for the account of Simonds Shields Lonsdale Grain Company..

Waybill Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charge
12-4	91077	RI	140396	12-4	Hillsdale,Mich	$1.00
12-4	91076	SaL	1685[illegible]	12-4	" "	1.00
12-4	91075	RI	140006	12-4	" "	1.00
12-4	91081	RI	140039	12-4	" "	1.00
12-4	91080	RI	140153	12-4	" "	1.00
12-4	91079	RI	43319	12-4	" "	1.00
12-7	91284	RI	142317	12-6	" "	1.00
12-7	91285	RI	142553	12-6	" "	1.00
12-7	91286	RI	141581	12-6	" "	1.00
12-7	91287	RI	142563	12-6	" "	1.00
12-7	91288	RI	142949	12-6	" "	1.00
12-9	48054	RI	41987	12-9	Des Moines,Iowa	1.00
12-14	49190	RI	141402	12-12	Mpls,Minn.	1.00
12-14	49189	RI	142506	12-12	" "	1.00
12-14	49188	RI	140365	12-12	" "	1.00
12-14	86427	RI	140010	12-12	" "	1.00
12-14	86426	RI	45738	12-12	" "	1.00
12-14	86425	RI	141781	12-13	Knoxville,Tenn	1.00
12-14	49187	RI	142789	12-13	Okla City,Okla.	1.00
12-14	49186	RI	142016	12-13	" "	1.00
12-14	86428	RI	140149	12-12	Mpls,Minn	1.00
12-14	86424	RI	141629	12-13	Knoxville,Tenn	1.00
12-14	49268	MP	120908	12-13	Des Moines,Iowa	1.00
12-17	91770	CGW	85160	12-18	Hillsdale,Mich	1.00
12-17	91771	RI	142603	12-18	" "	1.00
12-17	91772	RI	140767	12-18	" "	1.00
12-17	91773	CP	244665	12-18	" "	1.00
12-17	91774	CP	245099	12-18	" "	1.00
12-17	91775	CP	245577	12-18	" "	1.00
12-24	91927	RI	133905	12-24	Battle Creek,Mich	1.00
12-26	51272	CP	207562	12-26	Des Moines,Iowa	1.00
~~12-31~~	~~[illegible]~~	~~RI~~	~~142546~~	~~12-27~~	~~Norris Elevator~~	~~1.00~~
~~12-31~~	~~[illegible]~~	~~RI~~	~~140614~~	~~12-27~~	~~" "~~	~~2.00~~
~~12-31~~	~~[illegible]~~	~~MPC~~	~~[illegible]~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~[illegible]~~	~~RI~~	~~[illegible]~~	~~12-27~~	~~" "~~	~~2.00~~
~~12-31~~	~~[illegible]~~	~~CP~~	~~244480~~	~~12-27~~	~~" "~~	~~2.00~~
~~12-31~~	~~[illegible]~~	~~RI~~	~~140181~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~[illegible]~~	~~RI~~	~~140[illegible]~~	~~12-27~~	~~" "~~	~~2.00~~
~~12-31~~	~~[illegible]~~	~~RI~~	~~140[illegible]~~	~~12-27~~	~~" "~~	~~2.00~~
~~12-31~~	~~[illegible]~~	~~[illegible]~~	~~[illegible]~~	~~12-27~~	~~" "~~	~~1.00~~

Waybill Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charge
12-4	91077	RI	140396	12-4	Hillsdale,Mich	$1.00
12-4	91076	SaL	16857	12-4	" "	1.00
12-4	91075	RI	140006	12-4	" "	1.00
12-4	91081	RI	140039	12-4	" "	1.00
12-4	91080	RI	140153	12-4	" "	1.00
12-4	91079	RI	43319	12-4	" "	1.00
12-7	91284	RI	142317	12-6	" "	1.00
12-7	91285	RI	142558	12-6	" "	1.00
12-7	91286	RI	141581	12-6	" "	1.00
12-7	91287	RI	142503	12-6	" "	1.00
12-7	91288	RI	142949	12-6	" "	1.00
12-9	48054	RI	41987	12-9	Des Moines,Iowa	1.00
12-14	49190	RI	141402	12-12	Mpls,Minn.	1.00
12-14	49189	RI	140506	12-12	" "	1.00
12-14	49188	RI	140365	12-12	" "	1.00
12-14	86427	RI	140010	12-12	" "	1.00
12-14	86426	RI	45738	12-12	" "	1.00
12-14	86425	RI	141781	12-13	Knoxville,Tenn	1.00
12-14	49187	RI	142789	12-13	Okla City,Okla.	1.00
12-14	49186	RI	142016	12-13	" "	1.00
12-14	86428	RI	140149	12-12	Mpls,Minn	1.00
12-14	86424	RI	141629	12-13	Knoxville,Tenn	1.00
12-14	49268	MP	120908	12-13	Des Moines,Iowa	1.00
12-17	91770	CGW	85160	12-18	Hillsdale,Mich	1.00
12-17	91771	RI	142603	12-18	" "	1.00
12-17	91772	RI	140767	12-18	" "	1.00
12-17	91773	CP	244665	12-18	" "	1.00
12-17	91774	CP	245099	12-18	" "	1.00
12-17	91775	CP	245577	12-18	" "	1.00
12-24	91927	RI	133905	12-24	Battle Creek,Mich	1.00
12-26	51272	CP	207562	12-26	Des Moines,Iowa	1.00
~~12-31~~	~~90486~~	~~RI~~	~~142646~~	~~12-27~~	~~Norris Elevator~~	~~1.00~~
~~12-31~~	~~90484~~	~~RI~~	~~140614~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90485~~	~~NYC~~	~~93696~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90483~~	~~RI~~	~~140038~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90482~~	~~CP~~	~~244450~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90446~~	~~RI~~	~~140120~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90487~~	~~RI~~	~~140305~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90488~~	~~RI~~	~~140301~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90489~~	~~RI~~	~~140252~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90490~~	~~RI~~	~~142441~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90492~~	~~RI~~	~~140901~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90493~~	~~RI~~	~~140611~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90494~~	~~RI~~	~~140424~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90495~~	~~RI~~	~~140494~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90496~~	~~B4~~	~~5[illegible]517~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90497~~	~~PM~~	~~49973~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90498~~	~~RI~~	~~141760~~	~~12-27~~	~~" "~~	~~1.00~~
~~12-31~~	~~90499~~	~~CP~~	~~245432~~	~~12-27~~	~~" "~~	~~1.00~~

31.00

Waybill Date	Waybill Number	Car Initial	Car Number	Date Coopered	Destination	Coopering Charge
[illegible]						
12-5	65574	Milw	708829 ✓	12-4	White City,Kans	1.00
12-7	91302	Milw	706682 ✓	12-7	Capitan,New Mex	1.00
12-9	66128	Milw	711926 ✓	12-7	Herington,Kans	1.00
12-14	49134	Milw	701405 ✓	12-13	Okla City,Okla	1.00

Date	Number	Initial	Number	Loaded	Destination	Charge
[illegible]						
12-5	65574	Milw	708829 ✓	12-4	White City,Kans	1.00
12-7	91302	Milw	706682 ✓	12-7	Capitan,New Mex	1.00
12-8	66128	Milw	711926 ✓	12-7	Herington,Kans	1.00
12-14	49134	Milw	701405 ✓	12-13	Okla City,Okla	1.00
12-17	49389	Milw	705212 ✓	12-16	Lincolnville,Kans	1.00
12-20	67908	Milw	706810 ✓	12-19	White City,Kans	1.00
12-20	67910	Milw	709596 ✓	12-19	Hutchinson,Kans	1.00
12-23	68176	Milw 7	711494 ✓	12-20	Okarche,Okla	1.00
12-26	68469	Milw	708700 ✓	12-23	Antelope,Kans	1.00
12-30	68912	Milw	713814 ✓	12-27	Okarche,Okla.	1.00
						10.-

4 Cross Town

Statement of cars coopered for bulk grain loading at Kansas City, Mo-Kansas during January 1936 for account of Simonds Shields Lonsdale Grain Co-

Date	Car Number	Initial	Number	Date Coopered	Destination	Coopering Charge
I-4	92223	R I	41126	I-3	Monroe Mich	$2.00
I-6	52564	R I	44084	I-6	Des Moines,Ia	I.00
I-6	52570	R I	44759	I-6	Enid,Okla	I.00
I-6	52571	R I	41590	I-6	"	I.00
I-7	92467	R I	158067	I-7	Huntington W Va	I.00
I-7	92468	R I	42800	I-7	"	I.00
I-13	55798	R I	I41238	I-13	Shawnee,Okla	I.00
I-13	55799	R I	I41244	I-13	"	I.00
I-13	55800	R I	I41424	I-13	"	I.00
I-13	55801	R I	I42091	I-13	"	I.00
I-13	55797	R I	I58511	I-13	Des Moines,Ia	I.00
I-13	92725	R I	503807	I-13	Hillsdale Mich	I.00
I-13	92722	CP	241970	I-13	"	I.00
I-13	92721	NYC	I80076	I-13	"	I.00
I-13	92726	R I	I40586	I-13	"	I.00
I-13	92723	R I	I41695	I-13	"	I.00
I-13	92724	R I	43822	I-13	"	I.00
I-14	54099	R I	I41283	I-14	Shawnee,Okla	I.00
I-15	92724	R I	I55678	I-15	Huntington W Va	I.00
I-17	92881	R I	I42405	I-17	Hilladale Mich	I.00
I-17	92882	R I	I41020	I-17	"	I.00
I-17	92885	R I	I40907	I-17	"	I.00
I-17	92884	R I	I40243	I-17	"	I.00
I-17	92885	R I	865560	I-17	"	I.00
I-20	92925	M P	30009	I-17	Detroit Miahe	I.00
I-20	92965	NW	42110	I-20	Huntington W Va	I.00
I-20	92954	R I	I40808	I-20	Massilion Ohio	I.00
I-24	56111	CNW	I24744	I-24	Des Moines, Ia	I.00
I-24	93190	R I	I41750	I-24	Ft Worth Texas	I.00
I-24	93191	MoP	95222	I-24	"	I.00
I-24	93192	MoP	95665	I-24	"	I.00
I-24	93189	R I	I42844	I-24	"	I.00
I-24	93188	R I	I41206	I-24	"	I.00
I-24	93193	R I	I57667	I-24	Hilladale Mich	I.00
I-24	93194	R I	I40725	I-24	"	I.00
I-24	93195	R I	IC0361	I-24	"	I.00
I-25	93214	R I	I40015	I-24	"	I.00
I-25	93215	R I	I40570	I-24	"	I.00
I-25	93216	R I	IC0253	I-24	"	I.00
I-28	93355	R I	I41259	I-28	"	I.00
I-28	93354	R I	I41719	I-28	"	I.00
I-28	93353	R I	I41656	I-28	"	I.00
				I-28	"	I.00

Date	Car Number	Initial	Number	Date Covered	Destination	Coopering Charge
I-4	92522	R I	4II26	I-3	Monroe Mich	$2.00
I-6	52564	R I	44084	I-6	Des Moines,Ia	I.00
I-6	52570	R I	44750	I-6	Enid,Okla	I.00
I-6	52571	R I	41590	I-6	"	I.00
I-7	92467	R I	I50067	I-7	Huntington W Va	I.00
I-7	92468	R I	42000	I-7	"	I.00
I-13	52798	R I	I4I288	I-13	Shawnee,Okla	I.00
I-13	52799	R I	I4I244	I-13	"	I.00
I-13	52800	R I	I4I424	I-13	"	I.00
I-13	52801	R I	I42091	I-13	"	I.00
I-13	52797	R I	I505II	I-13	Des Moines,Ia	I.00
I-13	92723	R I	503207	I-13	Millsdale Mich	I.00
I-13	92722	GP	24I970	I-13	"	I.00
I-13	92721	NYC	I80076	I-13	"	I.00
I-13	92726	R I	I40566	I-13	"	I.00
I-13	92725	R I	I4I685	I-13	"	I.00
I-13	92724	R I	43222	I-13	"	I.00
I-14	54099	R I	I4I285	I-14	Shawnee,Okla	I.00
I-15	92724	R I	I55678	I-15	Huntington W Va	I.00
I-17	92881	R I	I42403	I-17	Millsdale Mich	I.00
I-17	92882	R I	I4I020	I-17	"	I.00
I-17	92883	R I	I40907	I-17	"	I.00
I-17	92884	R I	I40843	I-17	"	I.00
I-17	92885	R I	865560	I-17	"	I.00
I-20	92935	M P	30009	I-17	Detroit Miahe	I.00
I-20	92965	NW	42II0	I-20	Huntington W Va	I.00
I-20	92954	R I	I40908	I-20	Massilion Ohio	I.00
I-24	56III	CBW	I24744	I-24	Des Moines, Ia	I.00
I-24	95I90	R I	I4I750	I-21	Ft Worth Texas	I.00
I-24	95I9I	MoP	95822	I-24	"	I.00
I-24	95I92	MoP	95665	I-24	"	I.00
I-24	95I89	R I	I42844	I-24	"	I.00
I-24	95I88	R I	I4I206	I-24	"	I.00
I-24	95I93	R I	I57667	I-24	Millsdale Mich	I.00
I-24	95I94	R I	I40725	I-24	"	I.00
I-24	95I95	R I	I00361	I-24	"	I.00
I-25	95214	R I	I40013	I-24	"	I.00
I-25	95215	R I	I40570	I-24	"	I.00
I-25	95216	R I	I00253	I-24	"	I.00
I-28	95355	R I	I4I259	I-28	"	I.00
I-28	95354	R I	I4I719	I-28	"	I.00
I-28	95353	R I	I4I656	I-28	"	I.00
I-28	95352	R I	I42851	I-28	"	I.00
I-28	95351	R I	I42663	I-28	"	I.00
I-28	95350	R I	I4I036	I-28	"	I.00
I-28	95356	R I	I42496	I-28	"	I.00
I-28	95357	R I	I4II57	I-28	"	I.00
I-28	95796	R I	I42598	I-28	"	I.00
I-28	95358	R I	I42223	I-28	"	I.00

Statement of cars coopered for balk grain loading at Kansas City, Mo-Kansas during January 1936 for account of Simonds Shields Lonsdale Grain [redacted]

Waybill Date	Number	Car Initial	Number	Date Coopered	Destination	Coopering Charge
I-6	52565	MILW	709154	I-4	Davenport Ia.	$1.00
I-6	52562	MILW	708821	I-6	"	1.00
I-6	52666	MILW	702697	I-6	"	1.00
I-6	52668	MILW	714039	I-6	"	1.00
I-9	60569	MILW	705430	I-7	Paxico Kans	1.00
I-17	62010	MILW	708669	I-16	Waldren, Kans	1.00
I-17	54826	MILW	709097	I-16	Caldwell Kans	1.00
I-21	55376	MILW	705670	I-20	White City Kans	1.00
I-31	64323	MILW	702535	I-31	Okla City, Okla	1.00
I-29	57050	MILW	706796	I-29	Des Moines Ia	1.00

$10.00

Statement of cars coopered for bulk grain loading at Kansas City, Mo., Kans. during the month of February 1936 for account of the Simonds-Shields-Lonsdale Grain Company.

WAYBILL Date	WAYBILL Number	CAR Initial	CAR Number	Date Coopered	Destination	Coopering Charges
~~2-4~~	~~98435~~	~~CRIP~~	~~I41694~~	~~2-3~~	~~Midland Mill~~	~~$0.25~~
~~2-4~~	~~98436~~	~~CRIP~~	~~I41689~~	~~2-3~~	~~"~~	~~0.25~~
~~2-4~~	~~98436~~	~~CRIP~~	~~I41145~~	~~2-3~~	~~"~~	~~0.25~~
~~2-4~~	~~98436~~	~~CRIP~~	~~I40471~~	~~2-4~~	~~"~~	~~0.25~~
~~2-4~~	~~98436~~	~~CRIP~~	~~I42251~~	~~2-4~~	~~"~~	~~0.25~~
2-4	93659	CRIP	I42889	2-3	Treichlers, Pa.	I.00
2-3	93630	CRIP	I42428	2-3	Hillsdale, Mich.	I.00
2-3	93626	CRIP	I42590	2-3	"	I.00
2-3	93627	CRIP	I42600	2-3	"	I.00
2-3	93628	CRIP	I42241	2-3	"	I.00
2-3	93629	CRIP	I41823	2-3	"	I.00
2-4	93698	CRIP	I40336	2-4	"	I.00
2-4	93697	CRIP	I40520	2-4	"	I.00
2-4	93696	CRIP	I40873	2-4	"	I.00
2-4	93695	CRIP	I40772	2-4	"	I.00
2-4	93694	CRIP	I40590	2-4	"	I.00
2-4	93693	CRIP	45273	2-4	"	I.00
2-4	58186	CRIP	I33289	2-4	Des Moines, Ia.	I.00
2-1	57631	CRIP	42851	2-1	Yukon, Okla.	I.00
2-7	58950	CRIP	I42460	2-7	Des Moines, Ia.	I.00
2-7	58949	CRIP	I41144	2-7	"	I.00
2-10	59306	CRIP	44942	2-10	"	I.00
2-10	93942	CRIP	I40653	2-10	Hillsdale, Mich.	I.00
2-10	93941	CRIP	I40707	2-10	"	I.00
2-10	93940	CRIP	I42678	2-10	"	I.00
2-10	93939	CRIP	I42038	2-10	"	I.00
2-10	93943	CRIP	I41663	2-10	"	I.00
2-10	93938	CRIP	40701	2-10	Middlesville, Mich.	I.00
2-11	94003	CP	230258	2-11	Hillsdale, Mich.	I.00
2-11	93999	CRIP	I41781	2-11	"	I.00
2-11	94000	CRIP	I41041	2-11	"	I.00
2-11	94002	CRIP	I42467	2-11	"	I.00
2-11	94001	CRIP	I42980	2-11	"	I.00
2-11	93991	CRIP	I41489	2-11	Knoxville, Tenn.	I.00
2-11	93990	CRIP	I33541	2-11	"	I.00
2-11	93989	CRIP	I57552	2-11	"	I.00
2-13	59931	CRIP	I41218	2-11	Des Moines, Ia.	I.00
2-13	59933	CRIP	I42504	2-11	"	I.00
2-13	59932	CRIP	I42649	2-11	"	I.00
2-14	94117	CRIP	I42641	2-11	Massillon, Ohio.	I.00

Grain Company.

WAYBILL Date	WAYBILL Number	CAR Initial	CAR Number	Date Coopered	Destination	Coopering Charges
~~2-4~~	~~98456~~	~~CRIP~~	~~I41694~~	~~2-5~~	~~Midland Mill~~	~~$1.00~~
~~2-4~~	~~98456~~	~~CRIP~~	~~I41668~~	~~2-5~~	~~"~~	~~1.00~~
~~2-4~~	~~98456~~	~~CRIP~~	~~I41186~~	~~2-5~~	~~"~~	~~1.00~~
~~2-4~~	~~98456~~	~~CRIP~~	~~I40471~~	~~2-4~~	~~"~~	~~1.00~~
~~2-4~~	~~98456~~	~~CRIP~~	~~I42851~~	~~2-4~~	~~"~~	~~1.00~~
2-4	93659	CRIP	I42889	2-3	Treichlers, Pa.	1.00
2-3	93630	CRIP	I42428	2-3	Hillsdale, Mich.	1.00
2-3	93626	CRIP	I42590	2-3	"	1.00
2-3	93627	CRIP	I42600	2-3	"	1.00
2-3	93628	CRIP	I42241	2-3	"	1.00
2-3	93629	CRIP	I41823	2-3	"	1.00
2-4	93698	CRIP	I40336	2-4	"	1.00
2-4	93697	CRIP	I40520	2-4	"	1.00
2-4	93696	CRIP	I40873	2-4	"	1.00
2-4	93695	CRIP	I40772	2-4	"	1.00
2-4	93694	CRIP	I40590	2-4	"	1.00
2-4	93693	CRIP	45273	2-4	"	1.00
2-4	58186	CRIP	I33289	2-4	Des Moines, Ia.	1.00
2-1	57631	CRIP	42831	2-1	Yukon, Okla.	1.00
2-7	58950	CRIP	I42460	2-7	Des Moines, Ia.	1.00
2-7	58949	CRIP	I41144	2-7	"	1.00
2-10	59306	CRIP	44942	2-10	"	1.00
2-10	93942	CRIP	I40653	2-10	Hillsdale, Mich.	1.00
2-10	93941	CRIP	I40707	2-10	"	1.00
2-10	93940	CRIP	I42678	2-10	"	1.00
2-10	93939	CRIP	I42038	2-10	"	1.00
2-10	93943	CRIP	I41663	2-10	"	1.00
2-10	93938	CRIP	40701	2-10	Middlesville, Mich.	1.00
2-11	94003	CP	230258	2-11	Hillsdale, Mich.	1.00
2-11	93999	CRIP	I41781	2-11	"	1.00
2-11	94000	CRIP	I41041	2-11	"	1.00
2-11	94002	CRIP	I42467	2-11	"	1.00
2-11	94001	CRIP	I42980	2-11	"	1.00
2-11	93991	CRIP	I41489	2-11	Knoxville, Tenn.	1.00
2-11	93990	CRIP	I33541	2-11	"	1.00
2-11	93989	CRIP	I57552	2-11	"	1.00
2-13	59931	CRIP	I41218	2-11	Des Moines, Ia.	1.00
2-13	59933	CRIP	I42504	2-11	"	1.00
2-13	59932	CRIP	I42649	2-11	"	1.00
2-14	94117	CRIP	I42641	2-11	Massillon, Ohio.	1.00
2-17	40716	CRIP	43587	2-17	Des Moines, Ia.	1.00
2-17	94247	CRIP	46382	2-17	Massillon, Ohio.	1.00
2-18	94270	NC	84367	2-17	Laurys, Pa.	1.00
2-18	40971	B&O	266165	2-17	Des Moines, Ia.	1.00
2-18	40970	CRIP	I42778	2-17	"	1.00
2-18	40969	CRIP	I41533	2-17	"	1.00
						$41.-

Simonds-Shields-Lonsdale Grain Company February 1936. 43-44

WAYBILL Date	WAYBILL Number	CAR Initial	CAR Number	Date Coopered	Destination	Coopering Charges
2-20	94375	CRIP	I41905	2-19	Hillsdale, Mich.	$1.00
2-20	94377	CRIP	I44027	2-19	"	I.00
2-20	94376	CRIP	I40909	2-19	"	I.00
2-20	94375	CRIP	I40757	2-19	"	I.00
2-20	94374	CRIP	I41607	2-19	"	I.00
2-20	94373	CRIP	I41976	2-19	"	I.00
2-20	94372	CRIP	I40759	2-20	"	I.00
2-24	42173	CRIP	I40333	2-24	Shawnee, Okla.	I.00
2-24	94490	CRIP	41713	2-24	Monroe, Mich.	I.00
2-25	42387	CRIP	I56759	2-25	Yukon, Okla.	I.00
2-26	42698	CRIP	I40614	2-26	Shawnee, Okla.	I.00
2-27	94640	CRIP	I40130	2-26	Hillsdale, Mich.	I.00
2-27	94641	CRIP	I40049	2-26	"	I.00
2-27	94642	CRIP	I42213	2-26	"	I.00
2-27	94643	CRIP	I41001	2-26	"	I.00
2-27	94644	CRIP	I42235	2-26	"	I.00
2-27	94645	CRIP	I41366	2-26	"	I.00
2-27	94646	CRIP	I40573	2-26	"	I.00
2-28	88992	CRIP	I40069	2-26	Fostoria, Ohio.	I.00
2-28	88990	CRIP	44523	2-26	"	I.00
2-28	88991	CRIP	I40486	2-26	"	I.00
2-28	88989	CRIP	I33282	2-26	"	I.00
3-3	94881	CRIP	I40781	2-26	Hillsdale, Mich.	I.00
2-29	43538	CRIP	I40147	2-28	Des Moines, Ia.	I.00
2-28	88993	CRIP	I58679	2-28	Fostoria, Ohio.	I.00
2-28	88994	CRIP	I40156	2-28	"	I.00
2-28	94727	CMStPAP	712470	2-28	Indianapolis, Ind.	I.00
2-28	94726	CP	235055	2-28	"	I.00
2-28	94725	CRIP	I42941	2-28	"	I.00
2-28	43370	CRIP	42578	2-28	Shawnee, Okla.	I.00
2-29	43537	CRIP	I42514	2-28	Des Moines, Ia.	I.00
~~2-28~~	~~90486~~	~~CRIP~~	~~I48861~~	~~2-28~~	~~Midland Mill~~	~~$.85~~ #
~~2-28~~	~~90486~~	~~MKT~~	~~95077~~	~~2-28~~	~~"~~	~~$.85~~ #
~~2-28~~	~~90486~~	~~D&O~~	~~206736~~	~~2-28~~	~~"~~	~~$.85~~ #
~~2-28~~	~~90486~~	~~ATSF~~	~~124077~~	~~2-28~~	~~"~~	~~$.85~~ #
~~2-28~~	~~90486~~	~~ATSF~~	~~185578~~	~~2-28~~	~~"~~	~~$.85~~ #
3-6	45267	UP	I38061	2-28	Yukon, Okla.	I.00

32.00

Cross Town Switch Move.

[fol. 45] Plaintiffs further state that all of said cars, so loaded with said grain or grain products as aforesaid, moved in interstate commerce.

Plaintiffs further state that they thereafter demanded from the defendant the sum of one dollar ($1.00) per car, or the total sum of six hundred twenty-four dollars ($624.00) for the said installation of grain doors on the said above-numbered cars, as provided by the said applicable tariff; that the defendant at all times failed and refused, and still fails and refuses, to pay the same.

Wherefore, plaintiffs pray judgment against the defendant in the said sum of six hundred twenty-four dollars ($624.00) together with the costs of this action.

Henry S. Conrad, L. E. Durham, Hale Houts, I. M. Lee, Attorneys for Plaintiffs.

IN UNITED STATES DISTRICT COURT

WAIVER OF ISSUANCE OF SUMMONS BY DEFENDANT, AND ENTRY OF APPEARANCE—Filed May 5, 1936

Now comes Simonds-Shields-Lonsdale Grain Company, defendant in the above entitled cause, and waives issuance of summons and hereby enters its appearance.

Simonds-Shields-Lonsdale Grain Company, by F. A. Theis, President.

IN UNITED STATES DISTRICT COURT

ORDER TRANSFERRING CAUSE TO JUDGE OTIS' DOCKET—Filed April 2, 1937

It is hereby ordered upon agreement of all the parties to the foregoing suits and with the consent of Judge Otis before whom similar causes are pending against the same defendant, that said suits be and are transferred to Judge Otis' docket, this 1st day of April, 1937.

Albert L. Reeves, District Judge.

Approved: M. W. Borders, Jr., Dean Wood.

[fol. 46] IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 13, 1937

Comes now defendant, and for its answer to plaintiff's petition, alleges and states as follows:

Defendant admits that the plaintiff railroad carrier is and was at all times mentioned in plaintiff's petition a corporation duly organized and existing according to law, and engaged as an interstate common carrier by railroad into and through many states. Defendant further admits that the shipments hereinafter referred to were interstate shipments. Defendant further admits that defendant is a corporation, organized and existing according to law.

Defendant admits that this Court has jurisdiction of this suit.

Defendant admits that plaintiff did, on July 1, 1935, attempt to post and publish the tariff as set forth in plaintiff's petition.

Defendant admits that on various dates since the effective date of the said purported tariff, the plaintiff delivered certain cars at the grain elevator of the defendant, designated by the defendant for loading grain and grain products in bulk by the defendant, which said cars after being so loaded, were transported over the lines of the plaintiff, the initial road haul carrier, and connecting lines to destination, and that the loading and unloading points of each of said shipments were not within the same terminal or switching district. Defendant admits that the number of cars so loaded and transported between July 1, 1935 and February 29, 1936, was six hundred twenty-four (624). Defendant admits after the said cars had been placed for loading and prior to the loading thereof, the plaintiff installed the necessary grain doors in each of said cars. Defendant admits that all of said cars so loaded with said grain or grain products moved in interstate commerce.

Defendant denies each and every other allegation contained in plaintiff's petition.

Further answering, defendant alleges and states that it was the duty of the plaintiff to furnish to and for defendant for the carriage of grain and grain products, adequate transportation facilities and suitable cars for such purpose, including the obligation to furnish grain doors and a terminal market such as Kansas City, fully coopered and ready

for loading, without charge to defendant; that the plaintiff had furnished such cars so coopered and ready for loading and such services for a period of many years to the de- [fol. 47] fendant, and that the plaintiff was compensated therefor by the line-haul rate; that the furnishing of the services and facilities covered by the aforesaid purported tariff was a part of the transportation service which plaintiff was under a duty to furnish to the defendant, and for which plaintiff was compensated by its line-haul rate, and for which no charge was or is owing from defendant to plaintiff; that the purported tariff is unreasonable in that it attempts to shift to the defendant, or the shipper, the duties to furnish the grain doors and services in connection therewith contrary to law; that the coopering of cars for grain loading as described in the said purported tariff is a transportation service, and the duty of the plaintiff, and not a part of loading and not the duty of the defendant.

Further answering, defendant states that the terms of the said purported tariff were not complied with by either the plaintiff or the defendant, and that no prior arrangement for the service therein described was ever made between plaintiff and defendant for any specified period of time or for any period of time; that defendant has always and consistently refused to pay the charge attempted to be set up in the said purported tariff or to make any prior arrangement or any arrangement of any kind with the plaintiff for the service; that the defendant has wholly and completely repudiated and denied any liability under the said purported tariff to the plaintiff, and that no arrangement of any kind whatsoever was made with the plaintiff under the said purported tariff.

Wherefore, defendant prays to be dismissed with its costs.

Borders, Borders & Warrick, Attorneys for Defendant.

In United States District Court

Record Entry of Filing of Stipulation of Facts and Waiver of Jury; Cause Submitted, May 6, 1937

This cause coming on regularly for trial, the parties appear by counsel and file Stipulation of Fact and Waiver of Jury. Counsel make opening statement and plaintiff introduces testimony and rests; defendant presents testimony

and rests; arguments are made by counsel, and the Court sets May 10, 1937 as date for submitting findings of fact and conclusions of law.

[fol. 48] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed May 25, 1937

A jury having been waived by both parties, I hereby find the issues in favor of the defendant and against the plaintiffs and assess the costs of this cause against the plaintiffs.

Dated at Kansas City, Missouri, this 25th day of May, 1937.

Merrill E. Otis, District Judge.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE MOTION FOR REHEARING—Filed May 25, 1937

On this 25 day of May, 1937.

It Is Ordered that the plaintiffs be and they are hereby granted leave to file their motion for a rehearing in this case for the consideration of the Court.

Merrill E. Otis, District Judge.

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' MOTION FOR REHEARING—Filed May 25, 1937

Come now the plaintiffs in the above entitled cause and respectfully submit to the Court that the Court should grant a rehearing in the above entitled cause from the judgment rendered in favor of the defendant, for the following reasons:

1. The Court in its opinion and judgment overlooked the fact that in law when the defendant by its letter of July 2, 1935, requested the plaintiffs to install the grain doors from then on out, and the plaintiffs did so install the grain doors,

the provision for prior arrangement was in law complied with, regardless of any protestations or agreements or promises of either party to the contrary.

2. The Court in its opinion and judgment overlooked the fact that in law when the Interstate Commerce Commission decided the provisions for prior arrangement were in every case waived where the carrier performed the service for the shipper and the shipper accepted the same that the Commission was deciding an administrative matter as to whether the provision of a tariff could or could not be waived, analagous to the waiving of an undercharge or any part thereof, which was just as conclusive on this Court as the [fol. 49] decision of the Interstate Commerce Commission in this case authorizing the waiver of forty cents on every dollar charged for this service.

3. The Court in its opinion and judgment overlooks the fact that in law the case of Davis vs. Henderson, 266 U. S. 92, does not hold that the provision for prior arrangement cannot be waived in this case: first, for the reason that the Interstate Commerce Commission had not there determined whether the provision of that tariff was waivable or not, in the exercise of its administrative discretion and, second, that had the Supreme Court of the United States held the provision waivable in the Davis vs. Henderson case, the shipper would have received a benefit by way of damages, not received by other shippers who in good faith complied with the tariff involved in that case requiring the giving of a written request for cars; whereas, in this case the effect of holding the provision in the tariff cannot be waived tends to give this defendant something that other shippers complying with this tariff in good faith and paying the dollar charge stipulated in the tariff for the service, did not get.

4. The Court in its opinion and judgment overlooked the fact in law that by its decision in this case in favor of the defendant, it has permitted the defendant to enjoy the benefit of the installation of the grain doors by the plaintiffs without charge, whereas other shippers who in good faith complied with the tariff and received not one whit more service from the plaintiffs will, because of their good faith, be required to bear the charge; resulting in an unjust discrimination in favor of this defendant against shippers in good faith, which is prohibited by the Interstate Com-

merce Act, so that the provision of the tariff for prior arrangements, if construed to have this effect, is totally void in law and does not prevent the accrual of the charge for the service rendered.

Conrad & Durham, Ilus Lee, Chas. M. Miller, Crane and Mersereau, Dean Wood, Attorneys for Plaintiffs.

IN UNITED STATES DISTRICT COURT

ORDER FOR AMENDMENT, NUNC PRO TUNC, OF JUDGMENT ENTRY
FILED MAY 25, 1937—Filed May 28, 1937

It is hereby ordered on the 28 day of May, 1937, upon good cause shown, that the judgment entry heretofore [fol. 50] entered in this cause on May 24, 1937 does not completely state the facts.

That said judgment entry be amended nunc pro tunc to show the facts and that the motion for rehearing heretofore filed by leave of court after such judgment entry be considered as filed to the new judgment entry entered and reading in terms and figures as in the attached copy.

Merrill E. Otis, United States District Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT ENTRY—Filed May 28, 1937

Now on this 25 day of May, 1937 this cause coming on to be heard, a jury having been waived by written stipulation filed in this cause, and the parties having agreed to submit the cause on an agreed statement of facts duly filed in the cause, and the Court having heard the evidence and the arguments of counsel, and having considered the agreed statement of facts, the cause is submitted to the Court, and, thereupon, the Court finds the issues in favor of the defendant and against the plaintiffs.

Wherefore, It Is Ordered, Adjudged And Decreed that the plaintiffs have and recover nothing from the defendant in this cause and that the costs be assessed against the plaintiffs.

Merrill E. Otis, United States District Judge.

IN UNITED STATES DISTRICT COURT

RECORD ENTRY, JUNE 29, 1937, MOTION FOR A NEW TRIAL SUBMITTED AND TAKEN UNDER ADVISEMENT

This day the parties appear by counsel and the Motion filed herein for a new trial is submitted to the Court and taken under advisement.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR A NEW TRIAL—Filed July 1, 1937

The motion of plaintiff for a new trial in the above entitled case having been duly considered by the Court and the Court [fol. 51] being fully advised in the premises, is by the Court overruled. It Is So Ordered.

An exception is allowed to plaintiff.

Merrill E. Otis, District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Aug. 30, 1937

Now come Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, Chicago, Rock Island and Pacific Railway Company, plaintiffs in the above entitled cause, by Ilus M. Lee of Conrad & Durham, Charles M. Miller, and Dean Wood of Crane & Mersereau, their attorneys in this cause, and feeling themselves aggrieved by the final judgment of the District Court of the United States for the Western Division of the Western District of Missouri in the above entitled cause, made and entered herein on the 25th day of May, 1937, the said plaintiffs having duly and timely filed a motion for a new trial herein, and said motion for a new trial having been considered and overruled by the court on the 2nd day of July, 1937, do hereby appeal from said final judgment to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the assignment of errors, filed herewith, and pray that this appeal be allowed and that citation be issued as pro-

vided by law and that a transcript of the record, proce
ings and documents upon which said judgment was bas
duly authenticated, be sent to the United States Circ
Court of Appeals for the Eighth Circuit, under the statu
and rules of said court in such cases made and provided.

Petitioners further pray that the amount of the e
bond on this appeal may be fixed by the order allowi
appeal.

Frank O. Lowden, James E. Gorman, Joseph
Fleming, Trustees, Chicago, Rock Island and P
cific Railway Company. By I. M. Lee, of Conr
& Durham; Charles M. Miller, Dean Wood
Crane & Mersereau, Their Attorneys.

[fol. 52] In United States District Court

Assignment of Errors—Filed August 30, 1937

Now come Frank O. Lowden, James E. Gorman, and Jo
eph B. Fleming, Trustees, Chicago, Rock Island and Pacif
Railway Company, plaintiffs in the above entitled caus
and file the following Assignment of Errors in the tri
and decision of said District Court in said cause upon whic
they will rely upon their appeal in said cause from the judg
ment and decree made and rendered in said District Cour
in said cause on the 25th day of May, 1937, motion for ne
trial overruled the 2nd day of July, 1937.

The District Court of the United States for the Weste
Division of the Western District of Missouri erred in th
trial and decision of the above entitled cause in the follow
ing particulars, to-wit:

1. The court erred in refusing, plaintiffs excepting, at the
close of all the evidence, to give the conclusion of law re-
quested by plaintiffs, for convenience referred to as Con-
clusion of Law No. 1, reading as follows:

"At the close of all the evidence, a jury having been
waived, the Court declares the law to be that the plaintiff
is entitled to recover on every shipment."

for the reason that the defendant requested the plaintiffs to
install the grain doors as a permanent course of dealing,
and the plaintiffs did comply with the defendant's request

and installed the grain doors; and for the further reason that the defendant accepted the plaintiffs' service of installing the grain doors and continued to accept said service from the time the applicable tariff went into effect throughout the period of suit; thereby for each of these reasons the defendant becoming liable for the charge under the applicable tariff for said service of installation; and for the further reason that under the admitted tariff filed and approved and under the law, plaintiffs were not only entitled to recover but were required to collect. Therefore, the court erred as aforesaid, because the judgment is not supported by the findings of fact, for all of the foregoing reasons, but, on the contrary, the findings of fact, for these reasons, entitle the plaintiffs to the giving of Conclusion of Law No. 1.

2. The court erred in refusing, plaintiffs excepting, at the close of all the evidence, to give the conclusion of law requested by plaintiffs, for convenience referred to as Conclusion of Law No. 2, reading as follows:

"At the close of all the evidence, a jury having been waived, the plaintiff moves the Court to find the issues for [fol. 53] the plaintiff and render judgment in the sum of Three Hundred Seventy-four Dollars Forty Cents ($374.40) in plaintiff's favor."

for the reason that the defendant requested the plaintiffs to install the grain doors as a permanent course of dealing, and the plaintiffs did comply with the defendant's request and installed the grain doors; and for the further reason that the defendant accepted the plaintiffs' service of installing the grain doors and continued to accept said service from the time the applicable tariff went into effect throughout the period of suit: thereby for each of these reasons the defendant becoming liable for the charge under the applicable tariff for said service of installation; and for the further reason that under the admitted tariff filed and approved and under the law, plaintiffs were not only entitled to recover but were required to collect. Therefore, the court erred as aforesaid, because the judgment is not supported by the findings of fact, for all of the foregoing reasons, but, on the contrary, the findings of fact, for these reasons, entitle the plaintiffs to the giving of Conclusion of Law No. 2.

3. The court erred in refusing, plaintiffs excepting, at the close of all the evidence, to give the conclusion of law requested by plaintiffs, for convenience referred to as Conclusion of Law No. 3, reading as follows:

"At the close of all the evidence, a jury having been waived, the Court declares the law to be that the decision of the Interstate Commerce Commission that the provisions in the tariff for a prior arrangement for a specified period of time was waivable by plaintiff is a decision of an administrative matter and is binding on this Court."

4. The court erred in refusing, plaintiffs excepting, at the close of all the evidence, to give the conclusion of law requested by plaintiffs, for convenience referred to as Conclusion of Law No. 4, reading as follows:

"At the close of all the evidence, a jury having been waived, the Court declares the law to be that the provisions of the tariff for a prior arrangement for a specified period of time was waived as to each car, in that the plaintiff performed the work of installation and the defendant accepted it."

5. The court erred in refusing, plaintiffs excepting, at the close of all the evidence, to give the conclusion of law requested by plaintiffs, for convenience referred to as Conclusion of Law No. 5, reading as follows:

[fol. 54] "At the close of all the evidence, a jury having been waived, the Court declares the law to be that the provision in the tariff for prior arrangement for a specified period of time was a condition precedent only to the rendering of the service of the installation of grain doors by the plaintiff for the defendant."

6. The court erred in refusing, plaintiffs excepting, at the close of all the evidence, to give the conclusion of law requested by plaintiffs, for convenience referred to as Conclusion of Law No. 6, reading as follows:

"At the close of all the evidence, a jury having been waived, the Court declares the law to be that the tariff provision for prior arrangement for a specified period of time did not in law prevent the accrual of the charge upon the performance of the service of installing the grain doors in

each car and the acceptance of such service by the defendant."

7. The court erred in refusing, plaintiffs excepting, at the close of all the evidence, to give the conclusion of law requested by plaintiffs for convenience referred to as Conclusion of Law No. 7, reading as follows:

"At the close of all the evidence, a jury having been waived, the Court declares the law to be that the tariff imposed the primary duty of installing the grain doors on the defendant, and the plaintiff in installing the grain doors in each car, installed the doors as defendant's agent under the tariff."

8. The court erred in refusing, plaintiffs excepting, at the close of all the evidence, to give the conclusion of law requested by plaintiffs, for convenience referred to as Conclusion of Law No. 8, reading as follows:

"At the close of all the evidence, a jury having been waived, the Court declares the law to be that the notice from the defendant to plaintiff that plaintiff permanently was expected to install the grain doors and the continued installation of the grain doors by plaintiff and continued acceptance of the service by defendant constituted a prior arrangement for a specified period of time under the tariff."

9. The court erred in giving, plaintiffs excepting, at the close of all the evidence its declaration of law, reading as follows:

"Upon the facts found we declare the law to be that the plaintiffs cannot recover from the defendant under the tariff sued upon by plaintiffs and that judgment should be for defendant."

[fol. 55] for the reason that the defendant requested the plaintiffs to install the grain doors as a permanent course of dealing, and the plaintiffs did comply with the defendant's request and installed the grain doors; and for the further reason that the defendant accepted the plaintiff's service of installing the grain doors and continued to accept said service from the time the applicable tariff went into effect throughout the period of suit: thereby for each of these reasons the defendant becoming liable for the

charge under the applicable tariff for said service
stallation; and for the further reason that under t
mitted tariff filed and approved and under the law,
tiffs were not only entitled to recover but were requi
collect. Therefore, the court erred as aforesaid, b
the judgment is not supported by the findings of fact,
of the foregoing reasons.

10. The court erred in rendering judgment in favor
defendant and against the plaintiffs, because the jud
is not supported by the findings of fact.

For which errors the plaintiffs, Frank O. Lowden,
E. Gorman, and Joseph B. Fleming, Trustees, Ch
Rock Island and Pacific Railway Company, pray tha
judgment of the District Court of the United States f
Western Division of the Western District of Missouri
dered on the 25th day of May, 1937, motion for new
overruled the 2nd day of July, 1937, be reversed and
judgment be rendered in favor of the plaintiffs an
costs.

I. M. Lee of Conrad & Durham, Charles M. M
Dean Wood of Crane and Mersereau, Atto
for Plaintiffs.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed August 30, 1937

Now on this day the petition of Frank O. Lowden, J
E. Gorman and Joseph B. Fleming, Trustees, Chicago
Island and Pacific Railway Company, praying that th
allowed an appeal to the United States Circuit Court o
peals for the Eighth Circuit, from the judgment made
entered in the above entitled cause on the 25th day of
1937, motion for new trial considered and overruled the
day of July, 1937, having been presented to the court,
hereby

[fol. 56] Ordered that an appeal to the United States
cuit Court of Appeals for the Eighth Circuit from said j
ment be and the same is hereby allowed, and that a c
fied transcript of record, testimony, exhibits, stipulat
proceedings and documents in accordance with praecip

forthwith transmitted to the said Circuit Court of Appeals for the Eighth Circuit.

It Is Further Ordered that the cost bond on appeal be fixed at the sum of two hundred fifty Dollars ($250.00), the same to act as a bond for costs and damages on appeal.

Dated this 30th day of August, 1937.

Merrill E. Otis, District Judge.

Bond on appeal for $250.00, approved and filed August 31, 1937, omitted in printing.

[fol. 57] In United States District Court

Bill of Exceptions—Filed September 14, 1937

Be It Remembered, that on the 6th day of May, 1937, and the days hereinafter mentioned, the above entitled cause came on regularly for hearing, a jury having been waived, at Kansas City, Missouri, before Honorable Merrill E. Otis, Judge of the United States District Court for the Western Division of the Western District of Missouri.

Appearances:

Plaintiffs were represented by their counsel Ilus M. Lee of Conrad & Durham, 901 National Fidelity Life Bldg., Kansas City, Missouri, and by associate counsel Charles M. Miller, 1011 Commerce Bldg., Kansas City, Missouri, and Dean Wood, of Lathrop, Crane, Reynolds, Sawyer & Mersereau, 1900 Fidelity Bldg., Kansas City, Missouri.

Defendant was represented by its counsel Melville W. Borders of Borders, Borders, & Warrick, 1415 Commerce Bldg., Kansas City, Missouri.

Whereupon, the following proceedings were had and entered of record:

Whereupon Opening Statements were made to the Court by Counsel for Plaintiffs and Defendant, respectively.

RECITAL OF WAIVER OF JURY

Mr. Lee: I suppose the record should show the waiv
the jury and that the case is submitted to the Court
have a stipulation to that effect.

PLAINTIFFS' EVIDENCE

Whereupon, the plaintiffs, by their counsel, to s
the issues on their part, offered and introduced the f
[fol. 58] ing evidence, both oral and documentary, in
and figures as follows, to-wit:

(Whereupon said document referred to by counsel,
in the nature of a stipulation, and agreed statement of
was by the Reporter marked as Plaintiffs' Exhibit
identification.)

Mr. Lee: Plaintiffs offer in evidence Exhibit marke
the Reporter Plaintiffs' Exhibit 1, which is a stipulatio
agreed statement of facts.

(Which said document so offered and received in
dence, marked Plaintiffs' Exhibit 1, Stipulation and ag
statement of facts, is in words and figures as follows
wit:)

PLAINTIFFS' EXHIBIT 1

STIPULATION AND AGREED STATEMENT OF FACTS

IN THE DISTRICT COURT OF THE UNITED STATES FOR
WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOU

No. 9481

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FL
ING, Trustees, Chicago, Rock Island and Pacific Railw
Company, Plaintiffs,

vs.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, a Corporati
Defendant

It is hereby stipulated and agreed, by and between
parties hereto, that a jury may be waived in the above
titled cause and the same submitted to the court on the f
lowing stipulated facts:

(1) It is stipulated and agreed that the plaintiffs are now, and were at all the times referred to in plaintiffs' petition, the duly and legally appointed trustees of the Chicago, Rock Island and Pacific Railway Company, they having been so appointed by the District Court of United States for the Northern District of Illinois in a certain bankruptcy proceeding therein pending, as alleged in plaintiffs' petition; that now and at all times mentioned and referred to in plaintiffs' petition, the said Chicago, Rock Island and Pacific Railway Company is and was a railroad corporation, organized and existing according to law, and that now and at all of said times the plaintiffs, as the Trustees of said Railway Company, were engaged in interstate commerce and interstate transportation in and through the State of Missouri and many other states.

[fol. 59] (2) It is further stipulated and agreed that now, and at all times mentioned and referred to in plaintiffs' petition, the defendant is and was a corporation, organized and existing according to law, and engaged in the business of shipping by railroad, in carload shipments in bulk, of grain and grain products, from Kansas City, Missouri-Kansas, into and through other states.

(3) It is further stipulated and agreed that plaintiffs duly filed with the Interstate Commerce Commission, and duly posted and published a certain Western Trunk Lines Freight Tariff No. 330, with respect to furnishing and installing grain doors, or lumber for side or end door barricades for carload shipments in bulk, of grain, grain products and other articles, at certain terminal elevator points specified in said Tariff, including Kansas City, Missouri-Kansas, and that the effective date of said Tariff was July 1st, 1935; that attached to this stipulation is a true and correct copy of said Tariff, marked "Exhibit A", the parties hereto agreeing that the same may be offered in evidence and used with the same force and effect as though duly certified by the Interstate Commerce Commission. The particular part of said Tariff, applicable to this case, is designated as Item No. 70, on page 13 of said Tariff.

(4) It is further stipulated and agreed that on July 2, 1935, following the effective date of said Tariff on July 1, 1935, the defendant, along with many other shippers of grain and grain products from terminals in Kansas City, Missouri-Kansas, sent by mail a joint letter to the local

freight agents of all railroads, including the plaintiffs, entering said terminals, to the general effect that the defendant, as a shipper of bulk grain, regardless of anything contained in the Tariff hereinbefore referred to, or any other rule or regulation filed with the Interstate Commerce Commission, or otherwise, and the other said shippers, signing such letter, would expect the plaintiffs and the other railroads to whom said joint letter was addressed, to continue from and after July 1, 1935, as before said date, to furnish and supply the defendant and the other said shippers, upon orders for cars to load and ship bulk grain, such equipment as would be suitable to carry such bulk grain safely, and that if ordinary box cars were furnished and supplied on said orders, the defendant and the other said shippers signing said letter would expect such cars to be fully coopered or prepared with necessary side-door barricades, completely installed and ready for loading, and that the defendant and said other shippers, regardless of the provisions of said Tariff, declined and would continue to decline to [fol. 60] pay plaintiffs any charge demanded for the service of installing, or placing of grain doors or barricades in cars delivered by plaintiffs to the defendant, upon orders of the defendant, for the loading of bulk grain; that the full text of said letter above referred to is as follows:

"The Board of Trade Kansas City, Mo.

Kansas City, Mo., July, 2, 1935.

Messrs: C. B. Cullison, Local Agent, The Alton Railroad Company; J. R. Hitchcock, Local Agent, A. T. & S. F. Railway Co.; R. M. Rhodes, Local Agent, C. B. & Q. Railroad Co.; C. W. Nunn, Local Agent, Chicago, Great Western Railroad Co.; R. G. Larson, Local Agent, C. M. St. P. and P., Railroad Co.; C. P. Varney, Local Agent, C. R. I. & P. Railway Co.; C. W. Nunn, Local Agent, Kansas City Southern Ry. Co.; C. Hosmer, Local Agent, M. K. & T. R. R. Co.; H. E. Johnson, Local Agent, Missouri Pacific Railroad Co.; B. J. Gleason, Local Agent, St. L. & S. F. Ry. Co.; G. M. Christ, Local Agent, Union Pacific Railroad Co.; R. B. Berrey, Jr., Local Agent, Wabash Railway Co.

GENTLEMEN:

The undersigned, being shippers of bulk grain located in Kansas City, Mo.-Kans., hereby notify you, and each of you,

that regardless of anything contained in items Nos. 70 and 75 appearing on page 13 of a certain tariff filed for your account by L. E. Kipp, Agent with the Interstate Commerce Commission under No. I. C. C. A-2579, or any other rule or regulation filed with the Interstate Commerce Commission or otherwise, they expect you to continue from and after July 1, 1935, as before said date, to furnish and supply them upon orders, for cars to load and ship bulk grain such equipment for said purpose as is suitable safely to carry bulk grain.

"Said undersigned parties further notify you that if ordinary box cars are furnished and supplied upon such orders they will expect them to be fully coopered or prepared with necessary side-door barricades completedy installed and ready for loading.

"Said undersigned parties further notify you that regardless of the tariff items, or any other rules or regulations, they decline and will decline to pay any charges whatsoever which may be demanded by you for any work or service involved in making your cars suitable for loading bulk grain, and in particular they decline and will decline to pay any charge for the alleged service of installing or placing [fol. 61] grain doors or barricades in cars tendered by you upon order for loading bulk grain.

"Said undersigned parties further notify you that if upon orders as aforesaid cars are furnished and supplied which are not fully coopered with grain doors or barricades in place or which are not otherwise suitable and properly prepared for loading bulk grain such cars will be accepted under protest, and protest is hereby made against each and every such car furnished or which may be furnished upon such orders.

"And said undersigned parties further notify you that if cars are furnished and supplied, contrary to this notice, which necessitate expenditure by said parties, or any of them, for labor or materials in order to install grain doors or barricades, or otherwise to make such cars suitable and properly prepared for loading bulk grain, then in that and every such event said parties will demand reimbursement in full together with interest for each and every such expenditure.

"Said parties hereby request you to acknowledge receip hereof upon the attached copy by return mail.

Yours truly, Continental Export Company, Davis Noland-Merrill Grain Co., Farmers National Grai Corporation, Lathrop-Marshall Grain Company Moore-Seaver Grain Company, Norris Grain Com pany, Scoulars-Bishop Grain Company, Simonds Shields-Lonsdale Grain Company, Uhlmann Grai Company, Washburn Crosby Company, Wolcott & Lincoln, Inc., by W. R. Scott. Orig. Signed (W. R Scott).

Address acknowledgments to W. R. Scott, 1419 Board of Trade Building, Kansas City, Mo."

[fol. 62] On July 15, 1935, the local agent of plaintiffs, along with the local agents of the various other railroads entering Kansas City, Missouri-Kansas, sent to the defendant and other grain companies in Kansas City, Missouri-Kansas, in reply to the letter quoted next above, the following joint letter:

"Kansas City, Mo., July 15, 1935.

Continental Export Company, Davis-Noland-Merrill Grain Company, Farmers National Grain Corporation, Lathrop-Marshall Grain Company, Moore-Seaver Grain Company, Norris Grain Company, Scoular-Bishop Grain Company, Simonds-Shields-Lonsdale Grain Company, Uhlmann Grain Company, Washburn Crosby Company, Wolcott & Lincoln, Inc., and Mr. W. R. Scott, 1419 Board of Trade Building, Kansas City, Mo.

GENTLEMEN:

In reply to your letter of July 2, 1935, relating to the installation of grain doors and other kindred matters, let me invite your attention to Item 70, as amended, and Item 75-A of the attached copy of WTL Tariff No. 339 (L. E. Kipp's ICC A-2579, H. B. Cummins' ICC 372, J. E. Johanson's ICC 2713, H. G. Toll's ICC 1358) and Supplement No. 1 thereto.

It is believed that upon mature reflection you will agree with us that neither the shipper nor the railroad company can be party to a practice not in conformity with the provisions of the tariff as written.

In connection with your suggestion that you will demand reimbursement for grain doors or lumber installed at your expense, permit us to say that payment of such bills would be contrary to the provisions of the applicable tariff and therefore illegal. Bills of that character therefore cannot be recognized.

Unless therefore you make unqualified arrangements pursuant to the terms of the tariff it will be necessary to provide cars which do not have the grain doors installed a- [fol. 63] though, of course, the carrier will provide grain doors or lumber as contemplated by the tariff.

Will you kindly acknowledge receipt?

Yours truly, C. B. Cullison, Local Agent, The Alton R. R. Co. J. R. Hitchcock, Local Agent, A. T. & S. F. Ry. Co. R. M. Rhodes, Local Agent, C. B. & Q. R. R. Co. C. W. Nunn, Local Agent, Chicago Great Western R. R. R. G. Larson, Local Agent, C. M. St. P. & P. R. R. Co. C. P. Varney, Local Agent, C. R. I. & P. Ry. Co. C. W. Nunn, Local Agent, Kansas City Sou. Ry. Co. C. Hosmer, Local Agent, M.-K.-T. R. R. Co. H. E. Johnson, Local Agent, Missouri Pacific R. R. Co. B. J. Gleason, Local Agent, St. L.-S. F. Ry. Co. G. M. Christ, Local Agent, Union Pacific R. R. Co. R. W. Berry, Jr., Local Agent, Wabash Ry. Co."

(5) It is further stipulated and agreed that between July 1, 1935 and February 29, 1936, plaintiffs, upon the orders of the defendant, placed at the defendant's elevator for loading by defendant with grain in bulk, a total of six hundred twenty-four (624) box cars, and that after said cars were placed for such loading and before they were loaded, plaintiffs, at their own cost and expense, furnished and installed the necessary grain doors in each of said 624 box cars, as alleged in plaintiffs' petition; that monthly during said period, plaintiffs rendered to the defendant bills of [fol. 64] $1.00 for each of said cars in which grain doors were installed by plaintiffs during the month for which such bills were rendered; that on November 22, 1935, the defendant returned to plaintiffs' agent all bills theretofore ren-

dered by plaintiffs to the defendant, with a letter declining to pay said bills, said letter being as follows:

"November 22, 1935.

Mr. H. W. Myers, Manager, Kansas City R. R. Clearing House Ass'n, Kansas City, Missouri.

DEAR MR. MYERS:

We are returning you herewith bills for $1.00 per car charge for alleged service of installing grain doors in cars furnished at the Rock Island and Milwaukee Elevators loaded with bulk grain for transportation over the various lines issuing these bills.

There is no tariff authority for this charge unless it be Item No. 70 of W. T. L. Tariff 330, which item however provides in paragraph (1) that the railroad will act as the shipper's agent and install grain doors at terminal elevator points at a charge of $1.00 per car if prior arrangements for the service are made with the carriers covering specified period of time.

This tariff became effective on July 1st and we know of no change in the practice of furnishing and installing grain doors from that existing prior to July 1st, the carriers continuing to furnish upon orders for cars to transport bulk grain, cars completely equipped with grain doors and ready for use. We have made no arrangement with any carrier under which such carrier was to install the doors as our agent as contemplated by the tariff above referred to.

For this reason will you please advise tariff authority for these charges and if the bills were issued under authority of Item 70 W. T. L. Tariff 330 will you please advise how you arrived at the conclusion this item justifies the charge in the absence of any arrangement as contemplated by paragraph (1)?

Yours very truly, Simonds-Shileds-Lonsdale Grain Co., by A. B. Frederickson."

[fol. 65] That on January 9th, 1936, plaintiffs, through their agent, replied to the letter of the defendant quoted last above as follows:

"I am in receipt of your letter of the 22 day of November, 1935, with which you returned bills rendered against your company covering tariff charges due for the installation of

ain doors in cars furnished for the transportation of bulk ain.

You request to be advised by what tariff authority these lls are presented and as to the arrangement made in con- ction with Paragraph 1 of Item 70 of WTL tariff 330.

As to your first question, you are advised that these bills e rendered under the authority of WTL freight tariff No. 0.

You are further advised that under date of July 2nd, 35, you were a party to a joint letter to the railroads, in hich was contained the following paragraph:

'Said undersigned parties further notify you that if ordi- ry box cars are furnished and supplied upon such orders ey will expect them to be fully coopered or prepared with cessary side door barricades completely installed and ady for loading.'

The Railroad Company in good faith accepted this notice at all cars ordered for grain loading were to be fully oopered as a prior arrangement made with the railroads, nd, accepting such prior arrangement, the cars were oopered for your account and as your agent, and were ccepted and used by you as such.

This state of facts renders the tariff charges applicable. I present herewith bills for the services rendered; and equest is hereby made that your check to cover be trans- itted without delay.

Yours truly, H. W. Myers, Manager."

That thereafter and on January 15, 1936, the defendant eplied to plaintiffs' letter quoted last above as follows:

fol. 66] "January 15, 1936.

Ir. H. W. Myers, Manager, Kansas City Railroad Clear- ing House Association, Kansas City, Missouri.

)EAR SIR:

Replying to your letter of January 9th, file 7968, and eturning various bills for charges covering alleged service f installing grain doors in cars loaded with grain at the filwaukee and Rock Island Elevators.

We have noted all you have said and cannot agree with ou that Mr. Scott's letter of July 2nd, under our signature ould be construed as making a prior arrangement with the arriers for this service.

As we stated in our letter of November 22nd, we have not made any arrangement with any carrier to perform this service in accord with the provisions of Item 70 W. T. L. tariff 330, which states this arrangement is to be made with the carriers and to cover a specified period of time.

For this reason we decline to pay the bills and return them with this letter.

Yours very truly, Simonds-Shields-Lonsdale Grain Co., A. B. Frederickson."

On March 30th, 1936, the local agent of plaintiffs, along with the local agents of the various other railroads entering Kansas City, Missouri-Kansas, sent to the defendant and other grain companies in Kansas City, Missouri-Kansas, in reply to the letter quoted next above, the following joint letter:

"Kansas City, Missouri,
March 30, 1936.

J. C. Brackett Grain Co., Bruce Bros. Grain Co., Checkerboard Elevator Co., B. C. Christopher & Co., Clay-Leahy Grain Co., Continental Export Co., Davis-Hunt Grain Co. [fol. 67] Davis Noland Merrill Grain Co., Ernst-Davis Commission Co., Farmer's National Grain Corp., Fuller Grain Co., Goffe & Carkener, Inc., Hart Bartlett Sturtevant Grain Co., Ismert Hincke Milling Co., Kansas Elevator Co., Kansas Flour Mills Corp., Larabee Flour Mills Co., Lathrop Marshall Grain Co., Mensendieck Grain Co., Meservey-O'Sullivan Grain Co., Mid-Continental Grain Co., Midland Flour Milling Co., Moore-Seaver Grain Co., Morrison-Gregg-Mitchell Grain Co., Norris Grain Co., Ragan Grain Co., J. E. Rahm Grain Co., Ralston Purina Co., Robinson Elevator Co., Rocky Mountain Grain & Commission Co., Rodney Milling Co., Root Grain Co., Russell Grain Co., Scoular-Bishop Grain Co., Shannon Grain Co., Simonds-Shields-Lonsdale Grain Co., E. R. Stripp Co., E. H. Sullivan Grain Co., Uhlmann Grain Co., Vanderslice-Lynds Co., Watkins Grain Co., Wilser Grain Co., Wolcott & Lincoln, Inc., Cargill Grain Co., Staley Milling Co., United Mills Co., Inc., Paniplus Co., Corn Products Refining Co., Mr. W. R. Scott, Kansas City, Missouri.

GENTLEMEN:

Western Trunk Lines Tariff No. 330-A (Kipp's I. C. C. No. A-2653, Peel's I. C. C. No. 2779, Cummins' I. C. C.

No. 388) Provides, subject to qualifications stated in Items 70 and 75 thereof, that in connection with carload shipments [fol. 68] in bulk (subject to that tariff) of grain, grain products and other articles taking same rates, the necessary grain doors, or lumber in lieu thereof, shall be installed by the shipper (or his agent) and at his expense.

Such installation contemplates the usual accessorial service in preparation of cars, such as inspection, a limited amount of cleaning and minor and inexpensive repairs required to prevent loss of grain by leakage.

By Item 70 of the tariff, relative to shipments for road haul movement, it is provided that at the terminal elevator points specified in the item, the railroad agent 'will act as shipper's Agent and install grain doors at a charge of $1.00 per car; prior agreements for the service to be made with the carriers and to cover a specified period of time'.

By Item 75, relative to shipments in cross-town movement, i. e., from a loading point to an unloading point within the same terminal or switching district, it is provided that the shipper shall have three (3) options, if he so elects:

1. The carrier will furnish the grain doors or lumber and install the material in all of the cars of the shipper and reclaim and recondition such material and return it to owner carrier at a charge of $2.25 per car against the shipper;

or

2. The shipper may furnish his own material and install at his expense in all cars shipped by him, provided such material and method of installation shall adequately safeguard contents of car, in which event the carrier will make no charge for the material so furnished and installed;

or

3. The shipper may obtain from the carrier the necessary material at a rental charge of 15c per standard grain door per trip, or lumber in lieu of grain doors at a charge of 2½c per foot, board measure, per trip, the material to be reclaimed for the owning carrier.

In order that the tariff regulations may be strictly complied with, you will advise whether you elect to have carriers furnish cars with grain doors or lumber installed, or whether you elect to install grain doors or lumber for your account.

In the event you wish carrier to perform the installation service the period of time this arrangement shall be in force shall be specified.

[fol. 69] If you decline to enter into an arrangement, as provided by the tariff, or if you elect to install the grain doors or lumber for your own account, the carrier will furnish cars inspected and O. K.'d for grain loading, but without grain doors or lumber installed.

Yours truly, C. B. Cullison, Local Agent, The Alton R. R. Co. J. R. Hitchcock, Local Agent, A. T. & S. F. Ry. Co. R. M. Rhodes, Local Agent, C. B. & Q. R. R. Co. C. W. Nunn, Local Agent, Chicago Great Western R. R. Co. R. G. Larson, Local Agent, C. M. St. P. & P. R. R. Co. C. P. Varney, Local Agent, C. R. I. & P. Ry. Co. C. W. Nunn, Local Agent, Kansas City Sou. Ry. Co. C. Hosmer, Local Agent, M.-K.-T. R. R. Co. H. E. Johnson, Local Agent, Missouri Pacific R. R. Co. O. W. Miller, Local Agent, St. L.-S. F. Ry. Co. G. M. Christ, Local Agent, Union Pacific R. R. Co. R. W. Berry, Jr., Local Agent, Wabash Ry. Co."

(6) It is further stipulated and agreed that the defendant returned to plaintiffs all bills rendered by plaintiffs to the defendant for the installation of grain doors in said 624 box cars, and wrote letters declining payment of the same and referring to defendant's letters to plaintiffs of November 22, 1935, and January 15, 1936, for defendant's reasons for its refusal to pay said bills.

[fol. 70] (7) It is further stipulated and agreed that each and all of said 624 box cars were loaded by the defendant with grain in bulk after plaintiffs installed the necessary grain doors in each of said cars, and that said 624 carload shipments in bulk, of grain, thereafter moved in due course from defendant's elevator in Kansas City, Missouri-Kansas, in interstate commerce, and that the loading point and unloading point of all said 624 carload shipments in bulk of grain, were not within the same terminal or switching district.

(8) It is further stipulated and agreed that plaintiffs have repeatedly demanded of the defendant payment for the installation of the said necessary grain doors in said 624 box cars, and each of them, and that the defendant has

ll times refused, and still refuses, to pay for said service.
9) It is further stipulated and agreed that the parties
erve the right to offer, upon the trial of the case, subject
ll proper and legal objections, any testimony, either oral
documentary, not inconsistent with the above and fore-
ng stipulated facts.

)ated at Kansas City, Missouri, May 3rd, 1937.

L. E. Durham, Hale Houts, I. M. Lee, Charles N. Miller, Cyrus Crane, Geo. J. Mersereau, Dean Wood, Attorneys for Plaintiffs. Borders, Borders & Warrick, Attorneys for Defendant.

(Here follows one photolithograph, side folio 71)

EXHIBIT "A"
TO STIPULATION

FREIGHT TARIFF No. 220.

RULES AND REGULATIONS—Continued.

Item No.	SUBJECT	
70	Furnishing and Installing Grain Doors or Lumber for Side and End Door Barricades	(1) Grain Doors or Lumber for necessary side door barricades (also for necessary end door barricades, if car is equipped with end doors requiring such protection) for carload shipments in bulk, of grain, grain products, seeds and other articles taking same rates, as specified in Lists Nos. 1, 2, 3, 4, 5, 6, Items Nos. 200 to 270, inclusive, will be furnished at loading stations without charge, by the initial road-haul carrier. (See Note 1). The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time: Amarillo, Tex.; Atchison, Kan.; Cedar Rapids, Iowa; Chicago, Ill.; Chicago Switching District, as defined in Agent R. A. Sperry's 20-T, I. C. C. No. A-242; Clinton, Iowa; Council Bluffs, Iowa; Dallas, Tex.; Davenport, Iowa; Denver, Colo.; Des Moines, Iowa; Duluth, Minn.; East St. Louis, Ill.; Enid, Okla.; Ft. Worth, Tex.; Galveston, Tex.; Houston, Tex.; Hutchinson, Kan.; Kansas City, Mo.-Kan.; Leavenworth, Kan.; Lincoln, Neb.; Little Rock, Ark.; Memphis, Tenn.; Milwaukee, Wis.; Minneapolis, Minn.; Minnesota Transfer, Minn.; Oklahoma City, Okla.; Omaha, Neb.; Pekin, Ill.; Peoria, Ill.; St. Joseph, Mo.; St. Louis, Mo.; St. Paul, Minn.; Salina, Kan.; Sioux City, Iowa; Springfield, Ill.; Superior, Wis.; Topeka, Kan.; Wellington, Kan.; Wichita, Kan. (2) When the consignee (or his agent), where cars are unloaded, appropriates or destroys the grain doors or lumber used for side and/or end door barricades, a charge of $1.00 per grain door (or $5.00 per side or end doorway of a car for lumber used in lieu of grain doors) will be made. The amount so collected will accrue to the line-haul carrier or carriers. (3) Material furnished, used under these rules, will be transported with the shipment without charge. If track scale weights are used on carloads of Grain, Flaxseed and other articles provided in this tariff, in bulk, or Grain Products in bulk, in which grain doors or boards are used for side door or end door barricades, the weight of such grain doors or boards will be treated as part of the tare weight of the car. If the actual weight of the grain doors or boards is not ascertained an estimated weight of 60 pounds per grain door, or 2½ pounds per board foot for loose boards, will be used. **Note 1.**—These rules do not apply when loading point and unloading point of shipment are within the same terminal or switching district. (See Item 75.) **Note 2.**—The term "in bulk" used in this rule, means carload shipments of Grain, Grain Products or Flaxseed, which are loose or in mass and not in packages.

Exhibit "A," incorporated in and a part of Stipulation

[fols. 72-73] (Whereupon document presented by counsel for plaintiffs was by the Reporter marked Plaintiffs' Exhibit 2 for identification, being copy of Report of Interstate Commerce Commission.)

Mr. Lee: Plaintiffs next offer in evidence Exhibit 2, which is a copy of the Report of the Interstate Commerce Commission in case entitled Board of Trade, City of Chicago, et al., vs. Abilene & Southern Railway, et al., No. 27284, and two other consolidated cases.

Mr. Borders: I agree that the certificate by the Interstate Commerce Commission be waived. But I object to its introduction as irrelevant, incompetent and immaterial.

The Court: Overruled.

(Which said document so offered and received in evidence, marked Plaintiffs' Exhibit 2, copy of Report of Interstate Commerce Commission, is in words and figures as will be set out in the published reports of the Commission in volume 220 at page 753; material parts of the mimeographed copy of that report introduced in evidence at the trial, are set out here, because volume 220 I. C. C. has not been published yet, and the date of its publication is uncertain.)

PLAINTIFFS' EXHIBIT 2

Interstate Commerce Commission

No. 27284 [1]

BOARD OF TRADE OF THE CITY OF CHICAGO et al.

vs.

ABILENE & SOUTHERN RAILWAY COMPANY et al.

Submitted January 14, 1937

Decided April 12, 1937

Upon consideration of the rules, charges, regulations, and practices relating to the furnishing and installation of grain

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[1] This report also embraces No. 27286, Minneapolis Traffic Association, et al. v. Chicago & North Western Railway Company (Charles P. Megan, Trustee) et al., and No. 27290, Amarillo Grain Exchange, Incorporated v. The Chicago, Rock Island & Gulf Railway Company (Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees) et al.

doors, or lumber, for the protection of interstate carloa shipments of grain, grain products, or seed, in bulk, as pul lished on July 1, 1935, by the western lines for applicatio at certain terminal elevator points in western trunk-line an southwestern territories and the border points name Found:

[fol. 74] 1. It is not unreasonable to require that shipper shall, at their own expense, install grain doors furnishe by the carriers.

2. Where, at shipper's request, grain doors are installe by the carrier it is entitled to a reasonable charge for th service rendered.

3. Where the shipper elects to install grain doors fo bulk-grain loading at terminal elevator points, the door shall be placed by defendants either in the cars to be set fo loading or in stock piles adjacent and convenient to th locations at which the grain is to be loaded into the cars.

4. That the prescription of adequate rules in defendants schedules which will act as a deterrent against wanton de struction of their property is reasonable and proper.

5. That the clause in the existing schedules requiring th shipper to make prior arrangements for the service where he desires the carrier to install grain doors for bulk-grain loading is not unlawful, but the requirement may always be waived.

6. That the charge published by defendants for installing grain doors for bulk-grain loading, where the installation is performed by them, was, is, and for the future will be un- reasonable. Reasonable charge prescribed and reparation awarded.

* * * * * * *

Report of the Commission

MILLER, Chairman:

Exceptions to the report proposed by the examiner were filed by the parties, replies made, and the proceedings were

orally argued. Our conclusions differ in certain respects from those recommended by the examiner.

These three complaints, which were filed on January 13, 23, and 27, 1936, respectively, involve substantially the same issues, were heard on a consolidated record, and will be disposed of in one report. The respective complaints were filed by the Board of Trade of the City of Chicago, the Minneapolis Traffic Association, and the Amarillo Grain Exchange, Incorporated, on behalf of their members. Collectively, complainants allege that the rules, charges, regulations, and practices relating to the furnishing and installing of grain doors, or lumber in lieu thereof, for the protection of interstate carload shipments of grain, grain prod-
[fol. 75] ucts, or seed, in bulk, as published by the western carriers for application at terminal elevator points in western trunk-line and southwestern territories, but including Milwaukee, Wis., Chicago, East St. Louis, Peoria, Pekin, and Springfield, Ill., St. Louis, Mo., and Memphis, Tenn., are unreasonable and unlawful in violation of sections 1 and 6 of the Interstate Commerce Act. We are asked to determine and prescribe reasonable rules, charges, regulations, and practices for the future, and to award reparation. Upon the question of reparation, however, the parties stipulated on the record that all proof of damage may be deferred until the major issues involved have been determined. • • •

By schedules which became effective July 1, 1935, the western carriers revised the rules with respect to grain doors or lumber for necessary side and end door barricades for interstate shipments of grain, grain products, seeds and other articles taking same rates, in bulk, in carloads. Concisely stated, the portions of the item under attack are as follows:

1. The initial road-haul carrier will furnish the grain doors or lumber necessary as door barricades in connection with shipments of grain, grain products, seeds, and other articles taking same rates, in bulk, in carloads.

2. The grain doors or lumber so furnished shall be installed by the shipper or his agent and at his expense, but the railroad will act as shipper's agent and perform the instal-

lation service at the terminal elevator points specified [2] at a [fol. 76] charge of $1 per car where prior arrangements for the service are made with the carrier covering a specified period of time.

* * * * * * *

Other portions of the item, which provide that the grain doors or lumber used under the rule will be transported with the shipment without charge and that the rules and charges will not apply when loading and unloading points of shipment are within the same terminal or switching district, are not assailed. When the schedules publishing these rules were filed certain of the complainants in these proceedings sought unsuccessfully to have them suspended.

The grain doors which are furnished shippers of bulk grain without charge are of uniform standard design as approved by the Association of American Railroads. The approved grain door, which is designed to span the doorways

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[2]Amarillo,	Tex.	Little Rock	Ark.
Atchison,	Kans.	Memphis,	Tenn.
Burlington,	Iowa	Milwaukee,	Wis.
Cedar Rapids,	Iowa	Minneapolis,	Minn.
Chicago, (Ill.) switching district*		Minnesota Transfer,	Minn.
		Nebraska City,	Nebr.
Clinton,	Iowa	Oklahoma City,	Okla.
Council Bluffs,	Iowa	Omaha,	Nebr.
Dallas,	Tex.	Pekin,	Ill.
Davenport,	Iowa	Peoria,	Ill.
Denver,	Colo.	St. Joseph,	Mo.
Des Moines,	Iowa	St. Louis,	Mo.
Duluth,	Minn.	St. Paul,	Minn.
East St. Louis,	Ill.	Salina,	Kans.
Enid,	Okla.	Sioux City,	Iowa
Fort Worth,	Tex.	Springfield,	Ill.
Galveston,	Tex.	Superior,	Wis.
Houston,	Tex.	Superior East End,	Wis.
Hutchinson,	Kans.	Texas City,	Tex.
Itasca,	Wis.	Topeka,	Kans.
Kansas City,	Mo.-Kans.	Wellington,	Kans.
Leavenworth,	Kans.	Wichita,	Kans.
Lincoln,	Nebr.		

* As defined in Agent R. A. Sperry's tariff, I. C. C. A-242.

of standard box cars, is approximately 7 feet long, 20 inches wide, made of two courses of 1-inch lumber, cleated, and all boards are clinch-nailed together. Each door contains approximately 23-1/3 feet of lumber and weighs about 60 pounds, although the record instances weights as low as 45 and as high as 70 pounds. They are susceptible *of* handling to and from cars by one man. These grain doors are used in barricading side and end doorways of cars for the loading of bulk grain so as to prevent sifting of the grain from the car while in transit. Hinges are not used in attaching grain doors to cars, and the doors do not form a permanent part of the car. The method of installing grain doors is well understood, but in addition the Association of American Railroads issues from time to time, in pamphlet form, recommendations for inspecting, preparing and coopering cars, as well as instructions for releasing grain doors when the bulk grain is unloaded. These recommendations specifically state that in no circumstance should spikes be used in installing grain doors.

In equipping cars with grain doors it is usual to place folded or twisted paper on the doorway where the bottom grain door will rest and on the inside of the car door posts to which the grain doors are nailed. This paper is so fastened to the floor, sides of the car, and the grain doors as to prevent grain from sifting around the edges of grain doors, 6-penny nails being used to hold the paper in place. It requires about 20 yards of paper to prepare the doors of an ordinary box car for loading. In nailing the grain doors in place four nails, from 8 to 12 penny, are driven through the doors—two nails at each end—into the door posts. It is also considered good practice to install one grain door [fol. 77] behind the first and second grain door, and this reinforcement door is fastened to the other grain doors by the use of two nails. From three to five grain doors, according to capacity of the car, are used to barricade each side doorway of the car. For ordinary box cars an average of ten grain doors is used. When automobile or furniture cars with wide doorways are furnished a greater number of grain doors is necessary. After the grain is loaded in the car, which is ordinarily done by inserting the elevator grain spout in the car over the top grain door on the loading side, it is usual to nail in an additional board on that side of the car over the top of the top grain door, and this board is about 7 feet long and from 10 to 12 inches wide, being called a half

grain door. When this operation is completed the outer pe
manent slide doors of the car are closed and sealed, the e
is hammer-tested to show whether grain will sift from t
car, and the shipment is ready to move. Naturally there a
wide deviations in actual practice, but the above is sufficie
to show the construction of grain doors, their purpose, a
the method in which cars are provided therewith.

Prior to the establishment of the rules assailed, on Ju
1, 1935, it had long been the practice of defendants to furni
grain doors and to prepare cars for bulk-grain loading wit
out cost to the shipper at the terminal elevator points list
in footnote 3, or at most of those points, but, although d
fendants likewise furnished grain doors at country loadi
points, the installation at the latter points was, and still i
done by the shipper and at his expense. In Farmers' C
operative Assn. vs. Chicago, B. & Q. R. Co., 34 I. C. C. 60,
considered a petition filed in behalf of grain shippers
country stations. In that report we pointed out that b
cause of inability to secure a satisfactory permanent grai
door the practice of defendants for more than a quarter
a century had been to furnish grain shippers at country st
tions with "sectional doors" or boards, which could
nailed to the car door posts, and we further stated that ev
since grain has been shipped in bulk the shippers have bee
required to place the grain doors. We there expressed th
opinion that such a requirement is not unreasonable, as th
placing of the grain doors is an incident of loading and pro
erly should be performed by the shipper.

The railroad specification as to the character of car sui
able for bulk-grain loading is that it should have a goo
roof and good siding, and that the floor should be reasonabl
[fol. 78] clean, requiring only a small amount of sweepin
Ordinary box cars and automobile or furniture cars, if i
good repair, would come within the specification. But com
plainants contend that it is the duty of the carriers unde
the law to furnish cars suitable to transport in safety traff
which they hold themselves out to carry, and that cars ar
not suitable to transport safely grain or other freight in bul
unless adequate protection is furnished against leakage
the side and end doors of box cars, and also unless this pro
tection in the form of grain doors are installed and in posi
tion when the cars are set for loading. On the other hand
defendants take the position that when the installation
grain doors is performed by the carrier it is a service in th

nature of a concession to the shipper and not a service which, in the absence of a tariff provision, the carrier would be required to perform. In support of this position defendants point out that it is a recognized principle of law that the duty of loading and of unloading carload shipments rests upon the shipper or consignee, and they also refer to rules 27 and 30 of the Consolidated Freight Classification,[4] which, among other things, provide that the lading in closed cars must be so loaded as to prevent contact with car doors, and that temporary doors required to protect or make carload freight secure for shipment must be furnished and installed by shipper at his expense.

In further support of complainants' contention that defendants should install the grain doors at terminal points without cost to the shipper it is urged that the greatest efficiency results from the carriers' grain-door agency, or their contractors, doing the work inasmuch as such practice not only insures a uniform method, proper inspection of the cars at a minimum expense, and minimizes loss of grain from cars due to faulty installation, but also tends to reduce the unit cost of reclaiming grain doors. The reclaiming is done by the grain-door agency and is exclusively for the benefit of the carriers.

[fol. 79] At the present time the work of installing and of reclaiming grain doors is performed for the carriers by independent contractors at Kansas City, Mo., Fort Worth and Dallas, Tex., Minneapolis, Minnesota Transfer, St.

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[4] Consolidated Freight Classification. Rule 27 * * * Section 3. Shippers must observe carriers' rules regulating safe loading of freight and protection of equipment. Freight in closed cars must be so loaded as to prevent any contact with car doors during transit, and weight of lading must be approximately the same on each side of car.

Rule 30, Section 1. (a) Temporary blocking, flooring, or lining, racks, standards, strips, stakes, or similar bracing, dunnage, or supports, not constituting a part of the car, when required to protect and make carload freight secure for shipment, must be furnished and installed by shipper and at his expense. (b) Bulkheads, partitions, temporary doors or door protection, when required to protect or make carload freight secure for shipment, must be furnished and installed by shipper and at his expense. * * *

Paul, and Duluth, Minn., and Superior, Wis. At the remaining terminal elevator points these services are performed by the carrier-maintained grain-door agency of the Western Weighing & Inspection Bureau, hereinafter called W. W. & I. B. Complainants agree that this method of preparing cars for bulk-grain loading is satisfactory to all, and believe that this is due to the circumstance that the men employed for the purpose are experts in their line. To understand fully complainants' contention as above outlined, the work performed in reclaiming grain doors will be explained.

Upon delivery of an inbound car of bulk grain to an elevator at one of these terminal points the car is placed for unloading at the grain pit within the elevator, and the grain doors on the near or unloading side of the car are forced back into the car and the grain removed, usually by some mechanical means. Thereafter the car is swept to remove all of the grain, and the grain doors which were removed are placed back in the car. When these operations are completed the car is moved outside the elevator and the men employed by the grain-door agency proceed to take down the grain doors or lumber from the off side of the car, as well as from the end doors if the car is so constructed. These men then unload the grain doors and lumber onto ground adjacent and usually belonging to the elevator, clip all protruding nails from the doors, make such repairs as are found necessary, and place the doors in what are termed reclaim piles. During the reclamation, as well as during the installing operation, the grain-door agency maintains an accounting system whereby the several carriers are credited or debited for doors reclaimed or installed. When the accumulation of doors in the reclaim pile becomes excessive the so-called surplus doors are loaded into freight cars by the grain-door agency for return to the owning line, each door being stenciled or otherwise marked for identification with the name of the owning line. Subsequently the same men distribute the remaining doors from the reclaim piles to so-called stock piles, from which they carry the doors to cars which are set for installation.

In the latter operation the men employed by the grain-door agency first inspect the car to see whether it is fit for bulk-grain loading, sweep the car, make such minor repairs as may be found necessary, carry the necessary grain doors [fol. 80] from the stock piles and put them in the car, fix the

folded or twisted paper in place as previously explained, and nail in the grain doors. The reclaiming work begins when these men begin to take down the grain doors which were not removed when the grain was unloaded from the inbound car, and defendants take the position that the installation work for the outbound movement begins when the doors are taken from the reclaim piles and placed in the so-called stock piles. Complainants, however, contend that the work begins when the grain doors are carried from the so-called stock piles to the car. There is at least one radical modification of the operation just explained which is practiced at certain points. At Chicago, St. Louis, and possibly other terminal elevator points, after the grain is unloaded from the inbound car at the elevator and the car swept clean and before the reclamation work begins, it often happens that the car is immediately set for reloading with outbound bulk grain. Such a car is called a "reload". In such a case it appears that it is merely necessary to repaper and nail up the grain doors on one side of the car, and that this work can be done in from 5 to 8 minutes. The schedules which became effective July 1, 1935, do not differentiate between preparing a car in its entirety and preparing a "reload".

The evidence shows that the number of inbound shipments of bulk grain at these terminal elevator points is far in excess of those outbound. For the year 1935 it is shown that at 12 of these terminal markets 300,481 carloads of inbound bulk grain were received and 180,206 carloads were shipped. It is obvious, therefore, that, based on the number of inbound and outbound cars, the volume of work in reclaiming grain doors from inbound cars is in excess of that performed for outbound cars. The record shows that in the reclaiming work expedition is not required, whereas when a car is prepared for an outbound movement the work must be done immediately. Although the record is replete with evidence concerning the amount of time spent in the latter operation, and which will be covered later in this report, there is but little information concerning the amount of time spent in reclamation.

It is evident from the explanation as to the work performed by the employees of the grain-door agencies that the work of installation dovetails with the work of reclamation. Whether the grain-door agencies prepare cars for the outbound movement of bulk grain under the schedules which became effective July 1, 1935, or that work is done by the

shipper, the carriers must still maintain their grain-door [fol. 81] agencies for the purpose of reclaiming their grain doors from inbound cars. There is considerable merit, therefore, in complainants' contention that the performance of both classes of work by these men will tend to reduce the unit cost of reclaiming the doors. Certain of defendants' witnesses readily admit that this contention is meritorious.

Defendants stress the fact that at terminal elevator points the shipper is not required to install the grain doors. Under the new rules, if the shipper desires, he may avoid the carrier's charge by doing the work himself. But if the shipper desires the carrier will do the work, and the charge stated in the schedules, which defendants deem reasonable, will become applicable. According to defendants, the primary purpose of the item established July 1, 1935, was to simplify their tariffs, remove unjust discrimination, eliminate all wasteful practices such as those criticised by us in our reports in the western grain case, docket No. 17000, part 7, and to recoup some of the loss, amounting to about $6,000,000, estimated by the carriers to result from the findings in that case. They explain that they have considered the initiation of a charge at terminal elevator points for a number of years, but withheld action pending final disposition of the litigation in the western grain case and related cases.

The question as to unjust discrimination between country stations and terminal elevator points was fully discussed and a negative finding made in Farmers' Cooperative Assn. vs. Chicago, B. & Q. R. Co., supra. As to the alleged wasteful practices, complainants contend that nothing said in the western grain case would be construed as a criticism of defendants' practice of installing grain doors at terminal points without charge. Be that as it may, defendants interpret the prescription of the alleged low rates in the western grain case as including only "naked transportation" rates. Complainants are of the opposite view, but, regardless of this, point out that defendants' argument is inconsistent in that under the rules here assailed the carriers would still make the rates go further and include the furnishing of the grain doors without additional cost. Justification for this practice is found in the fact that the doors manufactured by or for the carriers are of uniform size and construction, which tends to facilitate their installation and removal, and the adoption of uniform doors meets the criticism made in Farmers' Cooperative Assn. vs. Chicago, B. & Q. R. Co.,

supra, that unlawful discrimination results from furnishing "sectional doors" at one point and loose boards at another. As to the theory that the rates prescribed in the [fol. 82] western grain case comprehend the installation of grain doors at terminal points by the carrier without cost to the shipper, defendants on brief make the point that, when it is considered that the shippers at terminal points are relatively few compared with the multitude of shippers at hundreds of country stations, it is inconceivable that in the prescription of grain rates in that case we would require the many to pay for a service they do not receive to compensate the carriers for the installation of grain doors for the relatively few shippers at terminal markets.

The reasonableness of requiring shippers to assume the expense of installing the special protection against leakage was upheld as to bulk grain in the Farmers' Cooperative Assn. case, supra; as to bulk salt in Sterling Salt Co. vs. P. R. R. Co., 43 I. C. C. 276; and as to bulk glass sand in Morgan County Sand Producers Asso. vs. B. & O. R. R. Co., 51 I. C. C. 475.

1. We find that, as the installation of grain doors is an incident of loading bulk grain, it is not unreasonable to require that the shipper should at his own expense install the doors furnished by the carriers and made available to him as provided in finding number 3 herein.

2. We further find that when, at the request of the shipper, the carrier installs the grain doors it is entitled to a reasonable charge for the service rendered.

Point Where Grain-Door Installation Begins

It is the position of certain of the complainants that if we find it not unreasonable to require the shipper at terminal elevator points to install the grain doors at his own expense, then he should be called upon only to nail up the doors and should not be expected to inspect the car, carry the doors from stock or reclamation piles and place them in the car, or sweep and repair the car. Under defendants' interpretation, wherever the grain doors are placed by the carrier's grain-door agency after reclamation is the place where the operation begins if the shipper installs the doors, and he will also be expected to perform the same service as the carrier's agency performs if it does the work, i. e., carry the doors from reclamation piles, inspect, sweep and make minor re-

pairs to the car, supply paper and nails, and nail up the grain doors. If the car set for bulk-grain loading contains an excessive amount of debris, or if it is in need of major repair, defendants concede that such a car should be rejected.

[fol. 83] It is the prevailing practice to place a suitable supply of grain doors and lumber for the use of the shipper when loading bulk grain in cars, and, to provide a designated carrier's cars with doors of the same ownership, it has become the further practice to place the doors in piles of individual ownership called stock piles. On the present record defendants concede that if the shipper installs the doors they will have no objection to the use of any available door, and this is interpreted to mean that ownership of cars and grain doors need not be identical.

3. We find that when the shipper elects to install grain doors for bulk-grain loading at terminal elevator points, the doors shall be placed by defendants either in the cars to be set for loading or in stock piles adjacent and convenient to the locations at which the grain is to be loaded into the cars.

* * * * * * *

Alleged Violation of Section 6 of the Act

Complainants also allege a violation of section 6 of the act on the ground that the following provision carried in the new rules is contingent, conditional, indefinite, vague, and uncertain:

The railroad will act as shipper's agent and install grain doors at terminal elevator points * * * at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time.

As complainants interpret the tariff, and as a condition precedent to the application of the charge, "prior arrangements for the service" must be made, and it is their contention that where such prior arrangements have not been made, many instances of this character being testified to on the record, the collection of the charge constituted a plain overcharge which should be refunded, and that where the carriers have billed shippers for the charge but it has not been paid there is no legal authority for its collection.

The clause relative to prior arrangements was obviously incorporated for the carriers' benefit, can be waived, and was waived in those instances in which the carriers acted as shipper's agent and installed the grain doors without prior request. Minneapolis Threshing Machine Co. vs. Minneapolis & St. L. R. Co., 37 I. C. C. 92, 93. In performing an accessorial service such as installing grain doors [fol. 84] it is only prudent for the carriers to seek information as to when and the period of time during which such service will be desired in order that sufficient man power may be made available. Manifestly, avoidance of the charge on the ground that prior arrangements were not made, when as a matter of fact the service was accepted and has been performed, cannot be justified.

5. We find that the charge as legally published in the schedules was applicable, and that the clause relative to "prior arrangements" is not ambiguous or in violation of section 6 of the act, but that the requirement may always be waived.

Allegation of Unreasonableness of Grain-Door-Installation Charge

Should it be found that it is reasonable and proper for defendants to make a charge for installing grain doors, then, in the alternative, complainants allege that the existing charge of $1 per car is unreasonable. In support thereof considerable testimony is given as to the length of time required to install grain doors, in performing the tasks connected therewith, and as to various other cost items.

* * * * * * *

At certain terminal elevator points the shippers have been performing this work since July 1, 1935.

* * * * * * *

Generally, since the new rules went into effect, the shippers at Minneapolis, St. Paul, Duluth, and Superior have employed outside contractors to install grain doors for bulk-grain loading, and the charge therefor is 60 cents per car. The same contractors perform similar work for defendants. Two firms at Omaha have also employed an outside contractor to perform this service, and his charge is 50 cents per car.

* * * * * * *

At points other than those where the work is done f
carriers by contractors it is performed by the grai
agency of the W. W. & I. B. The following table sho
addition to the number of industries shipping grain or
products from the terminal points named, the number
dustries which have been doing their own work since
1, 1935, and the number of industries using the W. W. &
service:

[fol. 85]

	Total number of industries	Industries doing own work	W. W. & doi wo
Amarillo, Tex.	8	5	3
Atchison, Kans.	6	4	2
Cedar Rapids, Iowa	7	7	0
Chicago, Ill.	42	0	42
Clinton, Iowa	2	2	0
Davenport, Iowa	5	2	3
Denver, Colo.	12	12	0
Des Moines, Iowa	6	5	1
Enid, Okla.	11	9	2
Galveston, Tex.	2	2	0
Hutchinson, Kans.	14	14	0
Little Rock, Ark.	12	12	0
Milwaukee, Wis.	21	2	19
Oklahoma City, Okla.	9	9	0
Omaha-Council Bluffs	21	20	1
Peoria, Ill.	12	7	5
Pekin, Ill.	5	3	2
St. Joseph, Mo.	15	14	1
St. Louis, Mo.	16	3	13
Sioux City, Iowa	7	7	0
Springfield, Ill.	4	3	1

. . . . . .

Defendants also point out that there is a large capita
vestment in the supply of grain doors maintained by t
at country and terminal stations on their lines. An exh
of record shows that during the years 1909-1934 defend
Atchison, Topeka & Santa Fe Railway Company purcha
8,490,639 doors at a total cost of $4,665,458.74. The aver
number purchased each year for this 26-year period
326,563, at an average yearly cost of $179,440.72. The a
age cost per door is shown to be 54.9 cents f. o. b. facto

The transportation and distribution expenses of grain doors are said not to be included in these figures, and it does not appear that any attempt has been made to apportion these capital investment figures to country and terminal stations, respectively.

Giving consideration to all of the evidence relative to the length of time consumed in equipping ordinary and "reload" cars with grain doors, to the cost figures, to the relevant factual circumstances instanced of record, and to the conclusions which may be drawn therefrom, we are convinced that complainants have sustained the allegation that the charge of $1 per car is unreasonable.

[fol. 86] * * * We are of the view, however, that the present record is lacking in sufficient competent evidence to justify a different charge on "reloads" than on other cars.

6. We find that in those instances where the railroad acts or has acted as shipper's agent in installing grain doors at the terminal elevator points specified in the schedules here under consideration the charge of $1 per car was, is, and for the future will be unreasonable to the extent that it has exceeded or may exceed 60 cents per car. An order for the future will be entered.

As previously stated, the parties to these proceedings stipulated on the record that all proof of damage may be deferred until the major issues have been determined by us. However, we find that in those instances in which complainants paid or bore the assailed charge they have been respectively damaged thereby in the differences between the charges paid and those which would have accrued at the charge herein found reasonable; that they are respectively entitled to reparation in those amounts, with interest; and that in those instances in which the charge has not been paid by complainants, waiver of collection of the undercharges down to the charge herein found reasonable should be, and it is hereby, authorized. Complainants should comply with rule V of the Rules of Practice, accompanying the statements filed under that rule by affidavits showing whether complainants paid and bore the charges. If defendants object to this form of proof, a further hearing may be requested.

McManamy, Commissioner, dissenting:

Like any other special charge or allowance this question is not free from difficulty and the decision cannot be based

wholly on precedent because with the innumerable c
dities and conditions which have been before us pre
can be cited to support almost any conclusion whi
mind can conceive.

Finding 1 places on the shipper the responsibility
stalling at his own expense grain doors furnished by t
riers and finding 2 authorizes the carriers to make a
for installing grain doors when done at the request of
per. With these I disagree. For a commodity such a
grain which moves in tremendous volume and alway
house car which must be leak proof and weather pr
is my view that the obligation should be absolutely
carriers to furnish suitable cars and this means that
and floor must be grain tight just as much as it mean
the roof must be storm tight. We should, therefore, re
[fol. 87] carriers to furnish suitable cars. Our author
do so is well established. Loomis vs. Lehigh Valley
240 U. S. 43.

If some special preparation is necessary then the
road is of course entitled to reasonable compensatio
the service rendered provided compensation is not al
included in the freight rate. This raises the questio
the existing rates include compensation for installati
grain doors? If they do, then, of course, there is no ju
cation for an additional charge for the service. The
jority finds that defendants are entitled to a special ch
without determining this vital point. The report state
fendants' interpretation of the Western Grain case w
is to the effect that the rates there prescribed do not inc
compensation for grain door installation, and comp
ants interpretation to the contrary, but is silent concer
our interpretation. To my mind the existing rates do
clude compensation for grain door installation. Prio
July 1, 1935, it was the practice of defendants to fur
and install grain doors at the terminal elevator points
considered, or at most of them at least, without spe
charge. The charge assailed was established on that d
While this subject appears to have been given no spe
consideration in our reports in the Western Grain cas
is to be noted that our decision on further hearing ther
205 I. C. C. 301 was rendered on October 22, 1934, and u
a record which had been made during a period of seve
years prior thereto. The rates there prescribed, therefo

must have been made in contemplation of the installation of grain doors without additional charge because that was the practice in effect when the case was heard and decision rendered. Moreover, in Farmers' Cooperative Asso. vs. C., B. & Q. R. Co., 34 I. C. C. 61, decided May 11, 1915, it is indicated that this practice was observed at terminal elevator points as long ago as 1911.

Most of the precedents relied upon by defendants and accepted by the majority as justifying present practices in regard to grain door installations are, in my judgment, not in point. It is true that in Farmers' Cooperative Asso. vs. C. B. & Q. R. Co., supra, it was stated that it was not unreasonable to require shippers of bulk grain to place the grain doors. That statement, however, was in conflict with other statements in the report. For example, it was said:

It is the duty of carriers to furnish cars suitable to transport in safety traffic which they hold themselves out to carry. This duty is not fulfilled when a carrier furnishes a [fol. 88] car, upon reasonable request of a shipper, which requires repairing to prevent leakage of grain in transit.

In Sterling Salt Co. vs. P. R. Co., 43 I. C. C. 276, before finding that the discontinuance of allowances to shippers for inside door protection for shipments of bulk salt was not unreasonable, it was first determined that the cost of this service was not included in the line-haul rate. It was there said:

When a commodity is of such a nature and the carrier furnishes this protection in the form of an inside door, an additional expense is incurred; and this expense is obviously a factor that may properly be considered when the rate is fixed. Where the rate is shown to embrace that factor no additional charge should be collected from the shipper. If, however, the transportation rate does not include compensation for this special expense the shipper should expect to pay an additional charge commensurate with the additional cost to the carrier.

Likewise, in National Lumber Dealers' Asso. vs. A. C. L. R. Co., 14 I. C. C. 154, wherein it was found that regulations requiring shippers to secure and stake lumber were not unreasonable, it was shown that the rates were originally made, and had long been maintained, in contemplation of that requirement.

In Morgan County Sand Producers' Asso. vs. B. & O. R. Co., 51 I. C. C. 475, and Sterling Salt Co. vs. P. R. Co.,

supra, the question was the lawfulness of allowances to shippers for performing services similar to those here considered, which practices we had condemned in Balfour, Guthrie & Co. vs. O. W. R. R. & Nav. Co., 21 I. C. C. 539, because conducive to rebates.

In Slatting Cars for Watermelons, 78 I. C. C. 732, we directed the cancellation of a special charge for the slatting of stock cars used for the interstate transportation of watermelons. This was a section 13 proceeding in which undue preference to Texas intrastate traffic was alleged because of the fact that no similar charge was made on the latter traffic. This was pursuant to an order of the Railroad Commission of Texas. It was shown that this order was issued under a State statute requiring railroads to furnish "suitable cars", and it is here shown that the same requirement is in effect on Texas intrastate grain traffic. In my opinion it is a sound one. Another analogous case is Colorado & Utah Coal Co. vs. D. & S. L. R. Co., 85 I. C. C. 545, wherein it was found that defendants' failure to equip box and stock cars with door boards, when such cars were used for the transportation of coal, was an unreasonable practice.

[fol. 89] In my opinion, the failure of defendants to install grain doors without charge in addition to the line-haul rates should be condemned as an unreasonable practice, in violation of section 1 (6), and as a noncompliance with their duty to furnish adequate car service and to establish and observe reasonable regulations and practices pertaining thereto, in violation of section 1 (11).

The report sets forth contentions of defendants that it is the duty of the shipper to inspect and clean cars furnished for the transportation of bulk grain, and to patch up cars that are not in suitable condition for that purpose, but lets these contentions drop without stating any conclusions or making any findings. Lest there [by] any misunderstanding, I take this occasion to set forth my own view, which is that this is an antiquated conception of railroad service, one that should be discarded voluntarily by the railroads as a matter of good business policy and, if they fail to do so, it is, in my judgment, something calling for further action on our part.

I am unable to agree with certain other findings in the report. It is found that the phrase requiring "prior ar-

rangements" to be made when a shipper desires that grain doors be installed by the railroad is not ambiguous, and that this requirement may be waived at the discretion of the latter. As I have indicated above, it is my view that the installation of grain doors should always be done by the railroad. If that were done there would of course be no necessity for prior arrangements. Manifestly the phrase "prior arrangements" is entirely indefinite and uncertain. We should require defendants to state in their tariffs, with a reasonable decree of certainty, what kind of prior arrangements should be made. The finding that the requirement may be waived at the discretion of defendants because the rule is in their own interest is directly contrary to the ruling of the Supreme Court in Davis vs. Henderson, 266 U. S. 92, wherein the Court held that a tariff rule providing that orders for cars must be in writing could not be waived by a railroad.

The Court said:

The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff.

Within the State of Texas under a statute requiring railroads to furnish "suitable cars" carriers for many years have without charge prepared cars for bulk grain loading and the intrastate schedules specifically provide that this will be done. A similar rule should be established here.

[fol. 90] I am authorized to state that Commissioners Splawn and Caskie join herein.

Commissioners Aitchison and Eastman did not participate in the disposition of these proceedings.

* * * * * * *

The above proceeding being at issue upon complaints and answers on file, and having been duly heard and submitted by the respective parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made part hereof:

It is ordered, That the above-named defendants, according as they perform the services at the respectively desig-

nated points, be, and they are hereby, notified and requi
to cease and desist, on or before July 20, 1937, and th
after to abstain, from publishing, demanding, or collecti
for the installation by them of grain doors in railroad c
placed for loading with grain, grain products, or seed
bulk, at the terminal elevator points desig[illegible]ed in the af
said report, a charge which shall exceed the charge nam
in the next succeeding paragraph hereof.

It is further ordered, That said defendants, according
they perform the services at the respectively designa
points, be, and they are hereby, notified and required
establish, on or before July 20, 1937, upon notice to t
Commission and to the general public by not less than
days' filing and posting in the manner prescribed in secti
6 of the Interstate Commerce Act, and thereafter to ma
tain and apply, for the installation by them of grain do
in railroad cars placed for loading with grain, grain pr
ucts, or seed, in bulk. at the aforesaid terminal eleva
points, a charge which shall not exceed 60 cents per c

And it is further ordered, That this order shall contin
in force and effect until the further order of the Comm
sion.

By the Commission.

W. P. Bartel, Secretary. (Sea

Mr. Lee: Now, I suppose, Mr. Borders, we might agr
that grain doors specifications set out on sheets four a
five obviously may be received in evidence. That giv
[fol. 91] the specifications of grain door sections as y
stated to the Court.

Mr. Borders: You mean description as to size?

Mr. Lee: Yes. These grain door specifications as set o
on sheets four and five of the Interstate Commerce Commi
sion opinion, offered in evidence. (Pages 755-6 of 2
I. C. C.)

Mr. Borders: Merely a description of what the grai
door is.

The Court: Very well.

Mr. Lee: We desire also to offer in evidence the note
the bottom of sheet eight taken from the Consolidate
Freight Specifications, Rule 27, Section 3 of that Rule. an
Section 1 of Rule 30. That is a note in the Interstate Com
merce Commission opinion, and we desire to offer that i
evidence.

The Court: Haven't you offered the whole opinion?

Mr. Lee: We offered it all, but I want specifically to call to the Court's attention that note.

Mr. Borders: I object, of course, for the same reason.

The Court: Note on what page?

Mr. Lee: Page 8. (Pages 757-8 of 220 I. C. C.)

The Court: All right.

Mr. Lee: Now, it is understood, is it, Mr. Borders, that the Item 7 of the Tariff involved in this case was in force throughout the period covered by this controversy, namely, July 1, 1935 to and including February 29, 1936?

Mr. Borders: Yes.

Mr. Lee: And while there have been some supplements and amendments to some parts of this Tariff, the Item involved in this controversy was in no manner changed?

Mr. Borders: Yes, I will agree it is in force, but not valid, it was posted.

The Court: You don't agree it was valid?

Mr. Borders: That is right.

Mr. Lee: Of course, I suppose the answer of defendant is in evidence any way.

The Court: Yes, it certainly is considered.

Mr. Lee: We offer then the Answer of Defendant and call the Court's attention to the fact that the Defendant admits jurisdiction of this Court to hear this controversy.

The Court: Anything further?

[fol. 92] Mr. Borders: As part of your case, Mr. Lee, I had an understanding, although not incorporated in the stipulation as to facts, that there was no answer to the letter of the carriers of March 30, 1936, set out on pages 9 and 10 and 11 of the stipulation, and I think the fact is there was no answer to the letter by the defendant.

Mr. Lee: That is admitted, and at this time called to Your Honor's attention, the fact that that letter was dated and sent after the last shipment involved. The last shipment was the last of February, while the letter is March 30th.

Thereupon, the plaintiffs rested their case.

Defendant's Evidence

Thereupon, the Defendant, to sustain the issues on its part, offered and introduced the following evidence, both

oral and documentary, in words and figures as follows, to-wit:

WALTER R. SCOTT, testified as a witness for the defendant as follows:

Direct examination.

By Mr. Borders:

My name is Walter R. Scott and I reside in Kansas City, Missouri where I am employed by the Board of Trade of Kansas City, Missouri as its Secretary and Transportation Commissioner. I am in charge of the Rate Department and Traffic Department of the Board of Trade, and its relations generally with the carriers in respect of transportation matters; and have occupied that position for seventeen years. As Secretary and Traffic man of the Board of Trade I have had frequent relations with the carriers involved in this proceeding and with their tariffs. For two years immediately preceding my connection with the Board of Trade I was in charge of the Rate Department of the Western Petroleum Refiners Association, which is a voluntary association of the Mid-Continent Petroleum Refiners. Prior to that I was for thirteen years in charge of the Public Service Commission of the state of Kansas, and before that I was chief clerk of the Santa Fe railroad at Topeka. Prior to that I had other positions involving acquaintance with traffic and rate matters. In connection with my duties for the Kansas City Board of Trade I have been and am now familiar with the various grain elevators in Kansas City and in the manner of handling grain in and out of those elevators by the railroad carriers.

The history of the method of transporting grain in bulk in the middle west has been, that ever since transportation by railroad in the territory west of Chicago, grain has been transported almost exclusively in bulk except in the far [fol. 93] western territory where it is largely handled in bags even at this time. But in the general territory in which Kansas City is interested more than ninety-nine per cent of the grain is and has been handled in bulk. The reason for this method is the greater economy which it permits in the handling of grain; both for the transportation companies and the elevator companies. Much larger loads can be obtained by that method of transportation and cars can be loaded and unloaded much more expeditiously. This condition has existed back at least to Civil War times. It is

absolutely necessary that the car for the carriage of grain in bulk be in such a condition that it will not leak. Grain flows very freely, and in this market where wheat is the predominant grain, wheat will sift out through very small apertures, and it is necessary therefore to have a car which is quite grain-tight in order to prevent loss in transit. Losses in transit in my experience are charged to the railway. The type of car ordinarily used for the carriage of grain in bulk is only the ordinary box car or house car, the standard railroad equipment. As such and without any other preparation they are quite unsuitable for handling grain, not even a small quantity can be handled in that manner without special preparation of the car. Because of the stresses set up during transportation the grain moves freely in the body of the car and will leak out around it, around the sliding door and through holes or small cracks in the structure of the car. The car must be inspected first to ascertain whether it is a car which will carry grain safely, and therefore it must be one which would be grain-tight and weather-tight and free from noxious odors and must be clean, that is, it must be free from debris left over by the previous loading. Beside the inspection of the car there must be special preparation made to render it proper to carry bulk grain. If after inspection the car is determined to be suitable for handling bulk grain it is generally necessary to patch the car to some extent; all openings must be covered with wood or with paper. The car must be cleaned, swept out and then these grain doors must be installed at the car openings.

Mr. Borders: Will you mark these, please.

(Whereupon photographs referred to by counsel for defendant were by the reporter marked defendant's exhibits A, B, and C for identification.)

A grain door is simply two courses of one inch lumber nailed together with overall dimensions of seven feet by twenty inches. They are laid one on top of another edgeways and it takes about four doors to cover the car opening, together with one which is used to reinforce the four which are nailed to the door post; some times two are used [fol. 94] for reinforcement. Altogether in an ordinary car approximately ten doors are used, five on each side. I do not mean five planks on each side, for a grain door consists of several planks nailed together and they cover an overall

dimension of twenty inches high and seven feet long. I mean five of these twenty inch widths. Each of these twenty inch widths we call a door; that is the ordinary term for each of them. Some times they are referred to as sectional doors, to make that distinction. They are attached to the car on the inside; they are nailed to the door posts. There is a door post on either side of the ordinary opening in the car and the so-called grain doors are nailed to the two door posts, one on each end of the grain door. The car is not entirely filled with grain, but up to a certain level. There is still room after these doors are attached to insert the spout through which the grain is loaded into the car, and the loading doesn't ordinarily proceed to a point where it is less than twenty-four inches below the roof of the car.

In terminal markets such as Kansas City, it is the practice to use a certain amount of strong paper which is folded and laid in the bottom of the door upon which the first grain door rests; and then other paper is placed between the door posts and these sectional doors to make a pad; and then some of the paper is brought back around behind the grain doors after they are filled up, the purpose being of course to make the opening absolutely grain-tight. About twenty yards of paper on the average is figured to be used in one car. The paper is used to plug up the little holes that might be left even after the grain doors themselves are added. If you take the grain doors and put one against the other, there would be a small opening left through which a fine commodity such as wheat might sift out; it is necessary to cover all these small openings with paper.

Exhibit A which you have handed me is a photograph of the Milwaukee elevator in Kansas City with a string of cars at the coopering, track together with piles of grain doors which are ready for use, for installing in these cars preparatory to loading in the elevator. Exhibit C I have here is a close-up view of the same track, showing piles of grain doors along a string of empty cars ready for nailing up by the workmen. This Exhibit B is a photograph of a box car after the grain doors have been installed ready for loading. These pictures correctly reveal the grain door when on the pile on the ground and when installed ready for loading.

Defendant introduced in evidence defendant's Exhibits A, B, and C, reading in words and figures, as follows:

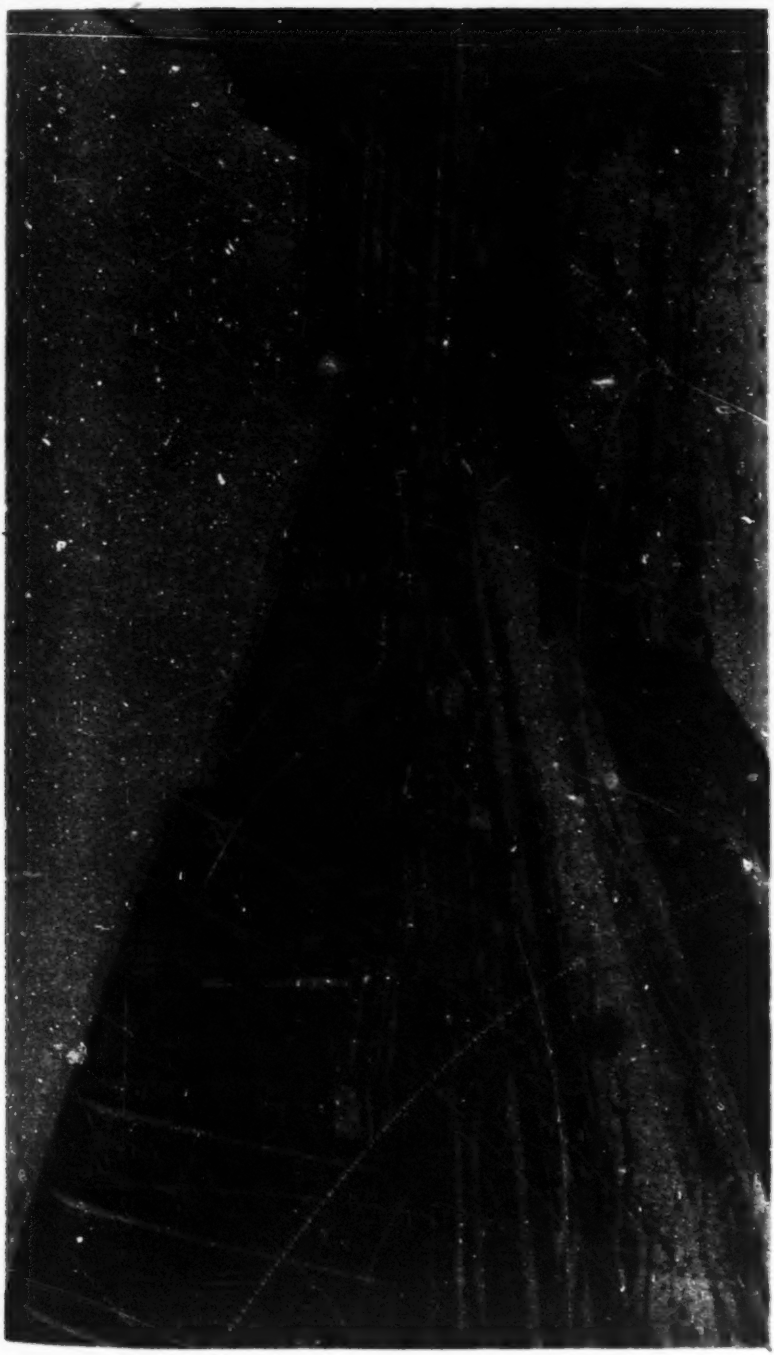
(Here follow three photolithographs, side folios 95-96, 97-98 and 99-100)

95-96

DEFENDANTS' EXHIBIT A.

DEFENDANTS' EXHIBIT B.

DEFENDANTS' EXHIBIT C.



[fol. 101] When I speak of "coopering track" I have reference to the fact in this market the term "coopering" includes the preparation of box cars for loading. It is a generic term as I understand it, including the inspection, the patching and sweeping and installing of grain doors. When you speak of coopering a car you include all of those processes.

From the time the car is ordered by an elevator for loading out until the time that that car leaves the elevator loaded, and in particular with reference to these grain doors, taking each step as it comes along, the car goes through the following steps. The first step is to order the cars, which is done by the elevator clerk the evening of the day before they are to be loaded out. The ordinary practice is for the elevator first to telephone the local railroad office, giving them the number of cars desired for the next day's loading. Some times the size of the car is specified and some times the destination, but not always. Those are the only things specified. The next morning the railway has set into the premises the number of cars ordered set in, on what I have referred to as the coopering track. About eight o'clock the next morning, after the cars are so placed in this market, the railroad's agent workmen take hold of the cars and repair them in the manner I have described. The coopering track, where the string of cars is set in, with reference to the loading chute of the elevator, is just ahead of the loading spout of the elevator, allowing perhaps two or three hundred yards, perhaps not that much. As a rule there is a mechanical device known as a car puller which the elevator uses to take hold of a string of cars and bring them up one by one to the elevator spout, and of course the first car must be within reach of that puller. They are all coupled together, so when the puller is used the entire string moves up step by step. When they are set on the coopering track by the railroad switch engine, the railroad inspectors in this market enter the cars and inspect them first. Then if they approve it as suitable for the loading of bulk grain, they proceed to patch them, clean them, sweep them out, and then to install the doors as I have said by using paper to protect the cracks. When that is done the car is ready for loading. These doors have been put on each side of the car and the elevator is then ready to move the cars up to the loading spout. Nothing is done by the elevator crew

until their car puller moves the car up to the spout; a
then the spout is placed in the car, the grain is loade
Afterward, after the car is loaded, the car is then mov
a distance beyond the elevator and subsequently the ra
[fol. 102] road employees make a test of the car by testi
it with hammer all around to see whether there are a
loose boards that will permit leakage of the grain. A
inspection is then made by the State inspection officials
determine the grade of the grain and then the car is seale
up, billing is given to the railroad, and the switch engi
moves it out.

The piles of grain doors are alongside the coopering trac
When I say that these railroad employees or agents do th
work of coopering the cars, including the work of installin
grain doors, I refer to a joint contractor here in Kansa
City, who has a contract with all railroads and does thei
work for them; the Goodwin Grain Door Agency I think i
the name. The car is never pulled down by the elevato
crew from the coopering track to the loading spout until th
coopering of the cars, all this work including the installa
tion of the grain doors, is done. Up to the time the car i
pulled down from the coopering track, the elevator em
ployes do not do any of that work. The practice I have
described applies to the two elevators of the defendant com
pany in this case and applies universally in the Kansas City
market.

The history of how the installation of grain doors has
been handled in the Kansas City terminal is familiar to me,
as I have made a special investigation to determine the limit
of that practice. The oldest record I can find dates back
to 1906. A survey was made at that time in this market
of all elevators. The practices at that time were not uni
form in the market, not the same as between different
elevators and not the same between any elevator and dif
ferent railroads; but the practices fell into three groups,
either the railroad installed the doors or employed an agent
to install them, or they employed the elevator company to
do it, paying the elevator company an allowance. That
practice proceeded without a tariff until some time after
1906 and before 1909, at which time a tariff was for the first
time filed. That tariff provided for an allowance where the
work was done by the elevator. In 1911 the allowances
were cancelled and thereafter the railroad uniformly em-

ployed a contractor to do the work. The contractor was employed by the railroad for some of the work as far back as 1906, according to the records of my office. The elevator companies have never paid in this market for the installation of grain doors since at least 1906. The practice with reference to the installation of grain doors is the same today and has been the same since July 1, 1935 as it was prior to that time. The practice with reference to installation of grain doors at country elevator points is not the same as at Kansas City or other terminal points. The [fol. 103] practice at country elevator points is for the elevator to install the doors. The railroad furnishes grain doors and places them on the premises as a rule, but the local elevator operator or his employes attaches the door to the car. The reason for the difference is that it was a matter of expediency. It is impossible naturally for the railroad to have men at one thousand grain elevator loading points. In Kansas City it is necessary to have a force of men in the market to install doors if they do nothing else. As to whether it is the expediency of the railroad or the elevator, it is the railroad's situation.

Cross-examination.

By Mr. Lee:

With respect to the size of grain doors and the manner of installation, I agree with the facts as set out in the opinion of the Interstate Commerce Commission offered in evidence, on pages four and five. I was not a witness at the hearing of that case before the Interstate Commerce Commission, but I did participate in the hearing; I was present at the hearing. I believe there is no variation between my testimony with respect to the installation of grain doors and the practice and custom, and what was testified in that case; I don't think of anything at the moment.

The correspondence between the carriers and the shippers, which included the correspondence set out in the stipulation received in this case, was introduced at that hearing. It was the same correspondence included in the stipulation in this case.

When a grain shipper is ready to ship one or more cars of grain, usually a clerk of the shipper notified the railroad in the afternoon that a car is wanted the next day. The num-

ber of cars necessarily varies; it is whatever they happen to need the next day. The defendant operates two elevators, one in Kansas City, Kansas and the other at Coburg, in Kansas City, Missouri. During the period mentioned in this suit, July 1, 1935 and including February of 1936, I don't know anything about whether or not the company shipped indiscriminately from both elevators; I presume they did. I have stated that ordinarily the sliding door of a box car is not sufficient to prevent great waste of wheat by leakage, and that is correct; and that the grain doors or a barricade nailed to the door post on the inside of the car is necessary to the shipment of grain in bulk.

There are more than two dozen grain elevators in Kansas City, Missouri and Kansas City, Kansas, including the whole terminal of greater Kansas City and they are [fol. 104] scattered over a wide territory, several miles apart. For some time past the carriers here have handled the matter of installing grain doors through an independent agency, a contractor, an outside agency.

(That was all the evidence offered at the trial.)

Thereupon, at the close of all the evidence, the Court announced that the parties would be given time to submit conclusions of law.

Thereupon, the plaintiffs stated that they would submit findings of fact, but the Court said that the parties were not to submit findings of fact because the stipulation of agreed facts would constitute his findings.

Thereafter, the Court made findings of fact as follows:

COURT'S FINDINGS OF FACT

"We find the facts as stipulated and agreed to by the parties, considering it unnecessary to make any additional findings of fact."

Thereafter and within the time allowed, plaintiffs requested the following conclusions of law, all of which were refused by the Court, and exception allowed to the plain-

tiffs to the refusal of each of said conclusions of law herein, for convenience numbered one to eight inclusive:

CONCLUSIONS OF LAW REQUESTED BY PLAINTIFFS AND REFUSAL THEREOF

One

"At the close of all the evidence, a jury having been waived, the Court declares the law to be that the plaintiff is entitled to recover on every shipment."

Two

"At the close of all the evidence, a jury having been waived, the plaintiff moves the Court to find the issues for the plaintiff and render judgment in the sum of Three Hundred Seventy-four Dollars and Forty Cents ($374.40) in plaintiff's favor."

[fol. 105]

Three

"At the close of all the evidence, a jury having been waived, the Court declares the law to be that the decision of the Interstate Commerce Commission that the provision in the tariff for a prior arrangement for a specified period of time was waivable by plaintiff is a decision of an administrative matter and is binding on this Court."

Four

"At the close of all the evidence, a jury having been waived, the Court declares the law to be that the provision of the tariff for prior arrangement for a specified period of time was waived as to each car in that the plaintiff performed the work of installation and the defendant accepted it."

Five

"At the close of all the evidence, a jury having been waived, the Court declares the law to be that the provision in the tariff for prior arrangement for a specified period of time was a condition precedent only to the rendering of the service of the installation of grain doors by the plaintiff for the defendant."

Six

"At the close of all the evidence, a jury having been waived, the Court declares the law to be that the tariff pro-

visions for prior arrangement for a specified period
time did not in law prevent the accrual of the charge up
the performance of the service of installing the grain do
in each car and the acceptance of such service by the
fendant."

Seven

"At the close of all the evidence, a jury having b
waived, the Court declares the law to be that the tariff
posed the primary duty of installing the grain doors on
defendant, and the plaintiff in installing the grain doors
each car installed the doors as defendant's agent under
tariff."

Eight

"At the close of all the evidence, a jury having b
waived, the Court declares the law to be that the notice fr
the defendant to plaintiff that plaintiff permanently
expected to install the grain doors and the continued inst
lation of the grain doors by plaintiff and continued acce
ance of the service by defendant constituted a prior
rangement for a specified period of time under the tari

[fol. 106] Upon the Court refusing to give the above c
clusions of law requested by the plaintiffs, plaintiffs at
time then and there were allowed an exception to the refu
of each of them.

Thereafter, the Court gave the following declaration,
conclusion, of law:

Court's Declaration or Conclusion of Law

"Upon the facts found, we declare the law to be that
plaintiffs can not recover from the defendant under
tariff sued upon by plaintiffs and that judgment should
for defendant.

To this declaration of law plaintiffs are allowed an
ception."

And thereafter, on the 25th day of May, 1937, the Co
rendered judgment for the defendant in words and figu
as follows:

Judgment Entry

Now on this 25th day of May, 1937, this cause coming on to be heard, a jury having been waived by written stipulation filed in this cause, and the parties having agreed to submit the cause on an agreed statement of facts duly filed in the cause, and the Court having heard the evidence and the arguments of counsel, and having considered the agreed statement of facts, the cause is submitted to the Court, and thereupon the Court finds the issues in favor of the defendant and against the plaintiffs.

Wherefore, It Is Ordered Adjudged And Decreed That the plaintiffs have and recover nothing from the defendant in this cause, and that the costs be assessed against the plaintiffs.

Thereafter plaintiffs were granted leave to file a motion for rehearing for the consideration of the Court, which was in words and figures as follows (omitting caption):

Plaintiffs' Motion for Rehearing

"Come now the plaintiffs in the above entitled cause and respectfully submit to the Court that the Court should grant a rehearing in the above entitled cause from the judgment rendered in favor of the defendant, for the following reasons:

[fol. 107] 1. The Court in its opinion and judgment overlooked the fact that in law when the defendant by its letter of July 2, 1935, requested the plaintiffs to install the grain doors from then on out, and the plaintiffs did so install the grain doors, the provision for prior arrangement was in law complied with, regardless of any protestations or agreements or promises of either party to the contrary.

2. The Court in its opinion and judgment overlooked the fact that in law when the Interstate Commerce Commission decided the provisions for prior arrangement were in every case waived where the carrier performed the service for the shipper and the shipper accepted the same, that the Commission was deciding an administrative matter as to whether the provision of a tariff could or could not be waived, analagons to the waiving of an undercharge or any part thereof, which was just as conclusive on this Court as the decision

of the Interstate Commerce Commission in this case authorizing the waiver of forty cents on every dollar charged for this service.

3. The Court in its opinion and judgment overlooks the fact that in law the case of Davis vs. Henderson, 266 U. S. 92, does not hold that the provision for prior arrangement cannot be waived in this case; first, for the reason that the Interstate Commerce Commission had not there determined whether the provision of that tariff was waivable or not, in the exercise of its administrative discretion and, second, that had the Supreme Court of the United States held the provision waivable in the Davis vs. Henderson case, the shipper would have received a benefit by way of damages, not received by other shippers who in good faith complied with the tariff involved in that case requiring the giving of a written request for cars; whereas, in this case the effect of holding the provision in the tariff cannot be waived tends to give this defendant something that other shippers complying with this tariff in good faith and paying the dollar charge stipulated in the tariff for the service, did not get.

4. The Court in its opinion and judgment overlooked the fact in law that by its decision in this case in favor of the defendant, it has permitted the defendant to enjoy the benefit of the installation of the grain doors by the plaintiffs without charge, whereas other shippers who in good faith complied with the tariff and received not one whit more service from the plaintiffs will, because of their good faith, be required to bear the charge; resulting in an unjust discrimination in favor of this defendant against shippers in [fol. 108] good faith, which is prohibited by the Interstate Commerce Act, so that the provision of the tariff for prior arrangements, if construed to have this effect, is totally void in law and does not prevent the accrual of the charge for the service rendered.

Conrad & Durham, Ilus Lee, Charles N. Miller, Crane and Mersereau, Dean Wood, Attorneys for Plaintiffs.

Thereafter, the Court on the 2nd day of July, 1937, after having heard the arguments of counsel, overruled the plaintiffs' motion for rehearing by an order reading as follows:

Order Overruling Motion for New Trial

"The motion of plaintiffs for a new trial in the above entitled case having been duly considered by the Court, and the Court being fully advised in the premises, is by the Court overruled. It Is So Ordered.

Exception is allowed to plaintiffs."

Merrill E. Otis, District Judge.

Approval of Bill of Exceptions by District Judge

Whereupon, the plaintiffs tendered this their Bill of Exceptions to the action of the Court in the various particulars therein set out, which is signed in open Court, sealed and made a part of the record in this case this, the 14th day of September, 1937.

Merrill E. Otis, District Judge.

Certificate Settling and Allowing Bill of Exceptions

I, the undersigned United States District Judge, who presided at the trial of the above entitled cause, do hereby certify that the foregoing Bill of Exceptions contains all of the material facts, matters, things, proceedings, objections, rulings and exceptions thereto, occurring upon the trial of said cause and not heretofore a part of the record herein, including all evidence adduced at the trial (or all evidence material to the issues presented by the assignments of error); and I further certify that the exhibits set forth or referred to, or both, in the foregoing Bill of Exceptions constitute all the exhibits offered in evidence at the said trial, and I hereby [fol. 109] make all of said exhibits a part of the foregoing Bill of Exceptions; and I hereby settle and allow the foregoing Bill of Exceptions as a full, true and correct Bill of Exceptions in this cause, and order the same filed as part of the record herein; and further order the Clerk of this Court to attach to the said Bill of Exceptions, all of the said exhibits not set forth therein; and to transmit said entire Bill of Exceptions, including all exhibits whatsoever, to the Circuit Court of Appeals for the Eighth Circuit.

I further certify that the foregoing Bill of Exceptions contains all local rules relating to the extension of the term

for the purpose of presenting, settling and filing a Bill of Exceptions, and all orders made by me extending the time for such presentation, settling and filing, and that the foregoing Bill of Exceptions is presented, settled and allowed within the time prescribed for that purpose.

Dated this 14 day of September, 1937.

Merrill E. Otis, United States District Judge

The above and foregoing Bill of Exceptions is hereby approved.

I. M. Lee of Conrad & Durham, Charles M. Miller, Dean Wood of Crane & Mersereau, Attorneys for Plaintiffs. Borders, Borders & Warrick, M. W. Borders, Jr., Attorneys for Defendant.

In United States District Court

Election as to Printing—Filed September 15, 1937

The plaintiffs herein hereby elect to have the record in the above-entitled cause printed under the supervision of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri.

I. M. Lee of Conrad & Durham, Charles M. Miller, Dean Wood of Crane and Mersereau, Attorneys for Plaintiffs.

[fol. 110] In United States District Court

Praecipe for Transcript—Filed September 15, 1937

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Judicial Circuit, under the appeal heretofore allowed herein, and include in said transcript the following pleadings, proceedings and documents on file, to-wit:

1. Plaintiffs' petition and record entry of filing thereof.
2. Defendant's entry of appearance and record entry of filing thereof.
3. Order transferring case to Judge Otis and record entry of filing thereof.

4. Defendant's answer and record entry of filing thereof.
5. Record entry of filing of stipulation of agreed facts nd waiving jury and of presentation of evidence and tak- ng case under advisement.
6. Bill of Exceptions as approved, including order, sig- ature and certificate of filing thereof, said bill of exceptions ncluding the stipulation of agreed facts and waiving jury.
7. Memorandum opinion and record entry of filing hereof.
8. Defendant's judgment entry of May 25, 1937, and ecord entry of filing thereof.
9. Order to file motion for rehearing and record entry f filing thereof.
10. Plaintiffs' motion for rehearing and record entry of ling thereof.
11. Order to amend judgment entry of May 25, 1937, and ecord entry of filing thereof.
12. Judgment entry of May 28, 1937, and record entry f filing thereof.
13. Record entry of submitting and taking plaintiffs' mo- on for rehearing under advisement.
14. Order overruling motion for rehearing and record ntry of filing thereof.
15. Petition for appeal and record entry of filing thereof.
16. Assignment of errors and record entry of filing hereof.
[fol. 111] 17. Order allowing appeal and record entry of ling thereof.
18. Appeal bond as approved and record entry of filing hereof.
19. Original citation with acknowledgment of service and ecord entry of filing thereof.
20. Certificate of Clerk that transcript is full and com- lete compliance with praecipe.
21. Election as to printing.

I. M. Lee of Conrad & Durham, Charles [illegible] Miller, Dean Wood of Crane & Merserea[illegible] Attorneys for Plaintiffs.

Service of a copy of the foregoing praecipe is hereby cknowledged this 15th day of September, 1937.

Borders, Borders & Warrick, Attorneys for Defendant.

In United States District Court

Order Extending Time to File Transcript—Filed October 4, 1937

It Is Hereby Ordered, for good cause shown, that the plaintiffs in the above-entitled cause have until Wednesday, November 17, 1937, to file their transcript in the United States Circuit Court of Appeals for the Eighth Circuit and docket the case, and that the time for filing the transcript and docketing the c extended from October 9, 1937 to November 17, 1937.

Signed this 4th day of October, 1937.

Merrill E. Otis, District Judge.

In United States District Court

Memorandum Opinion, Findings of Fact, Conclusion of Law, Indicated Judgment—Filed May 19, 1937

Plaintiffs sue to recover from defendant $624.00 claimed to be due for services rendered in installing grain doors on 624 cars furnished defendant under a tariff claimed by plaintiffs to be applicable and reading, in part—

[fol. 112] "The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of $1.00 per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time:"

Cars were furnished by plaintiffs to defendant in the number stated. The plaintiffs did install grain doors on these cars and billed the defendant at the rate of one dollar per car. Not only, however, were "no prior arrangements for the service" of installing the grain doors in question entered into by the plaintiffs and defendant, but the defendant positively and unequivocally refused to enter into such "arrangements." Since, on the face of the tariff, "prior arrangements" were prerequisite to the effectiveness of the tariff it would seem clear that plaintiffs cannot prevail in this case unless the party or parties for whose benefit the condition precedent of the tariff was written could and did waive it. Plaintiffs contend that the condition

as for their (the carrier's) benefit and that they could and ld waive it.

That the "prior arrangements" condition of this tariff is 1) for the benefit of the carrier and (2) may be waived by he carrier was ruled by the majority of the Interstate Com- nerce Commission in Board of Trade et al. vs. Railway Co., t al., decided April 12, 1937. The reasoning supporting he first of these conclusions is not set out in the report. t seems to us that the conclusion is entirely arbitrary and ltogether unsound.

The $1.00 charge is unreasonably high; the Interstate Commerce Commission so ruled in the case cited. The plain- iffs now admit that in no event should they have judgment t a higher rate than sixty cents per car. Plaintiffs concede hat the real value of the services rendered is not more than ixty cents. How can it be said that it is not, in part at east, for the benefit of the shipper that he shall have the ight of election between himself installing a grain door (a ixty cent job) and paying another $1.00 for doing that ob. Again, how can it be said that a choice as to whether 'the railroad will act as shipper's agent" vel non is of in- erest only to the railroad and of no interest whatever to he shipper?

Not only do we not agree with the majority of the In- erstate Commerce Commission in the case cited that the 'prior arrangements" condition of the tariff is for the sole enefit of the carrier, but we agree with the minority of that Commission that in no event can such a condition in a tariff e waived by either party. Davis vs. Henderson, 266 U. S. 92.

[fol. 113] Findings of Fact

We find the facts as stipulated and agreed to by the par- ies, considering it unnecessary to make any additional indings of fact.

Declaration of Law

Upon the facts found we declare the law to be that the plaintiffs cannot recover from the defendant under the tariff sued upon by plaintiffs and that judgment should be for defendant.

To this declaration of law plaintiffs are allowed an ex- ception.

Counsel for defendant will prepare and submit an appropriate judgment entry.

Merrill E. Otis, District Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 114] Appearances of counsel omitted in printing.

[fol. 115] In United States Circuit Court of Appeals

Order of Submission—April 18, 1938

This cause having been called for hearing in its regular order, argument was commenced by Mr. Dean Wood for appellant, continued by Mr. M. W. Borders, Jr., for appellee, and concluded by Mr. Hale Houts for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 116] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1938

No. 11,047

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, Chicago, Rock Island and Pacific Railway Company, Appellants,

vs.

Simonds-Shields-Lonsdale Grain Company, Appellee

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Dean Wood and Mr. Hale Houts (Mr. Luther Burns, Mr. Henry S. Conrad, Mr. Charles M. Miller, Mr. Cyrus Crane and Mr. George J. Mersereau were with them on the brief) for Appellants.

Mr. M. W. Borders, Jr., for Appellee.

Before Stone, Woodrough and Booth, Circuit Judges

OPINION—July 5, 1938

BOOTH, Circuit Judge, delivered the opinion of the Court:

This was an action brought by the appellants, hereinafter called "plaintiff-carrier", against the defendant, hereinafter called the "shipper", to recover for services in install-[fol. 117] ing certain grain doors on the box cars in which grain in bulk was shipped in interstate commerce by the shipper.

The Court below found in favor of the shipper, and from the judgment, this appeal was taken.

The facts were largely stipulated, and, with headings and signatures omitted, are set out in the margin.*

---

* Stipulation and Agreed Statement of Facts

"It is hereby stipulated and agreed, by and between the parties hereto, that a jury may be waived in the above entitled cause and the same submitted to the court on the following stipulated facts:

* * * * * * *

"(3) It is further stipulated and agreed that plaintiffs duly filed with the Interstate Commerce Commission, and duly posted and published a certain Western Trunk Lines Freight Tariff No. 330, with respect to furnishing and installing grain doors, or lumber for side or end door barricades for carload shipments in bulk, of grain, grain products and other articles, at certain terminal elevator points specified in said Tariff, including Kansas City, Missouri-Kansas, and that the effective date of said Tariff was July 1st, 1935; that attached to this stipulation is a true and correct copy of said Tariff, marked 'Exhibit A', the parties hereto agreeing that the same may be offered in evidence and used with the same force and effect as though duly certified by the Interstate Commerce Commission. The particular part of said Tariff, applicable to this case, is designated as Item No. 70, on page 13 of said Tariff.

"(4) It is further stipulated and agreed that on July 2 1935, following the effective date of said Tariff on July 1 1935, the defendant, along with many other shippers of grai and grain products from terminals in Kansas City, Missouri Kansas, sent by mail a joint letter to the local freight agent of all railroads, including the plaintiffs, entering sai terminals, to the general effect that the defendant, as shipper of bulk grain, regardless of anything contained i the Tariff hereinbefore referred to, or any other rule o regulation filed with the Interstate Commerce Commissio or otherwise, and the other said shippers, signing such lette would expect the plaintiffs and the other railroads to whom said joint letter was addressed, to continue from and afte July 1, 1935, as before said date, to furnish and supply th defendant and the other said shippers, upon orders for car to load and ship bulk grain, such equipment as would b suitable to carry such bulk grain safely, and that if ordinar box cars were furnished and supplied on said orders, th defendant and the other said shippers signing said lette would expect such cars to be fully coopered or prepared wit necessary side-door barricades, completely installed an ready for loading, and that the defendant and said othe shippers, regardless of the provisions of said Tariff, d clined and would continue to decline to pay plaintiffs an charge demanded for the service of installing, or placin of grain doors or barricades in cars delivered by plaintif to the defendant, upon orders of the defendant, for th loading of bulk grain;

* * * * * * *

(Quoted from letter of July 2, 1935.)

" 'The undersigned, being shippers of bulk grain locat in Kansas City, Mo.-Kans., hereby notify you, and each you, that regardless of anything contained in items Nos. and 75 appearing on page 13 of a certain tariff filed for yo account by L. E. Kipp, Agent, with the Interstate Commer Commission under No. I. C. C. A-2579, or any other rule regulation filed with the Interstate Commerce Commissi or otherwise, they expect you to continue from and aft July 1, 1935, as before said date, to furnish and supply the upon orders for cars to load and ship bulk grain such equi

ment for said purpose as is suitable safely to carry bulk grain.

"'Said undersigned parties further notify you that if ordinary box cars are furnished and supplied upon such orders they will expect them to be fully coopered or prepared with necessary side-door barricades completely installed and ready for loading.

4(a) "'Said undersigned parties further notify you that regardless of the tariff items, or any other rules or regulations, they decline and will decline to pay any charges whatsoever which may be demanded by you for any work or service involved in making your cars suitable for loading bulk grain, and in particular they decline and will decline to pay any charge for the alleged service of installing or placing grain doors or barricades in cars tendered by you upon order for loading bulk grain.

[fol. 118] "'Said undersigned parties further notify you that if upon orders as aforesaid cars are furnished and supplied which are not fully coopered with grain doors or barricades in place or which are not otherwise suitable and properly prepared for loading bulk grain such cars will be accepted under protest, and protest is hereby made against each and every such car furnished or which may be furnished upon such orders.

"'And said undersigned parties further notify you that if cars are furnished and supplied, contrary to this notice, which necessitate expenditure by said parties, or any of them, for labor or materials in order to install grain doors or barricades, or otherwise to make such cars suitable and properly prepared for loading bulk grain, then in that and every such event said parties will demand reimbursement in full together with interest for each and every such expenditure.'

* * * * * * *

"On July 15, 1935, the local agent of plaintiffs, along with the local agents of the various other railroads entering Kansas City, Missouri-Kansas, sent to the defendant and other grain companies in Kansas City, Missouri-Kansas, in

reply to the letter quoted next above, the following joint letter:

* * * * * * *

"'GENTLEMEN:

"'In reply to your letter of July 2, 1935, relating to the installation of grain doors and other kindred matters, let me invite your attention to Item 70, as amended, and Item 75-A of the attached copy of W. T. L. Tariff No. 330 (L. E. Kipp's I. C. C. A-2579, H. B. Cummins' I. C. C. 372, J. E. Johanson's I. C. C. 2713, H. G. Toll's I. C. C. 1358) and Supplement No. 1 thereto.

"'It is believed that upon mature reflection you will agree with us that neither the shipper nor the railroad company can be party to a practice not in conformity with the provisions of the tariff as written.

"'In connection with your suggestion that you will demand reimbursement for grain doors or lumber installed at your expense, permit us to say that payment of such bills would be contrary to the provisions of the applicable tariff and therefore illegal. Bills of that character therefore cannot be recognized.

"'Unless therefore you make unqualified arrangements pursuant to the terms of the tariff it will be necessary to provide cars which do not have the grain doors installed although, of course, the carrier will provide grain doors or lumber as contemplated by the tariff. * * *'

"(5) It is further stipulated and agreed that between July 1, 1935, and February 29, 1936, plaintiffs, upon the orders of the defendant, placed at the defendant's elevator for loading by defendant with grain in bulk, a total of six hundred twenty-four (624) box cars, and that after said cars were placed for such loading and before they were loaded, plaintiffs, at their own cost and expense, furnished and installed the necessary grain doors in each of said 624 box cars, as alleged in plaintiffs' petition; that monthly during said period, plaintiffs rendered to the defendant bills of $1.00 for each of said cars in which grain doors were installed by plaintiffs during the month for which such bills were rendered; that on November 22, 1935, the defendant returned to plaintiffs' agent all bills theretofore ren-

ered by plaintiffs to the defendant, with a letter declining o pay said bills, said letter being as follows:

"November 22, 1935.

. . . . . .

"'We are returning you herewith bills for $1.00 per car harge for alleged service of installing grain doors in cars urnished at the Rock Island and Milwaukee Elevators oaded with bulk grain for transportation over the various nes issuing these bills.

"'There is no tariff authority for this charge unless it be tem No. 70 of W. T. L. Tariff 330, which item however rovides in paragraph (1) that the railroad will act as the hip, r's agent and install grain doors at terminal elevator oints at a charge of $1.00 per car if prior arrangements for he service are made with the carriers covering specified eriod of time.

"'This tariff became effective on July 1st and we know of o change in the practice of furnishing and installing grain oors from that existing prior to July 1st, the carriers con- inuing to furnish upon orders for cars to transport bulk rain, cars completely equipped with grain doors and ready or use. We have made no arrangement with any carrier nder which such carrier was to install the doors as our gent as contemplated by the tariff above referred to.

[fol. 119] "'For this reason will you please advise tariff uthority for these charges and if the bills were issued nder authority of Item 70 W. T. L. Tariff 330 will you lease advise how you arrived at the conclusion this item ustifies the charge in the absence of any arrangement as ontemplated by paragraph (1)?'

"That on January 9th, 1936, plaintiffs, through their gent, replied to the letter of the defendant quoted last bove as follows:

. . . . . .

"'You request to be advised by what tariff authority hese bills are presented and as to the arrangement made in onnection with Paragraph 1 of Item 70 of W. T. L. tariff 30.

"'As to your first question, you are advised that these ills are rendered under the authority of W. T. L. freight ariff No. 330.

"'You are further advised that under date of July 2
1935, you were a party to a joint letter to the railroads,
which was contained the following paragraph:

"'"Said undersigned parties further notify you that
ordinary box cars are furnished and supplied upon s
orders they will expect them to be fully coopered or p
pared with necessary side door barricades completely
stalled and ready for loading."

"'The Railroad Company in good faith accepted t
notice that all cars ordered for grain loading were to
fully coopered as a prior arrangement made with
railroads, and, accepting such prior arrangement, the c
were coopered for your account and as your agent, and w
accepted and used by you as such.

"'This state of facts renders the tariff charges applica

"'I present herewith bills for the services rendered: a
request is hereby made that your check to cover be tra
mitted without delay.'

"That thereafter and on January 15, 1936, the defend
replied to plaintiffs' letter quoted last above as follows:

. . . . . .

"'Replying to your letter of January 9th, file 7968, a
returning various bills for charges covering alleged serv
of installing grain doors in cars loaded with grain at t
Milwaukee and Rock Island Elevators.

"'We have noted all you have said and cannot agree w
you that Mr. Scott's letter of July 2nd, under our signatu
could be construed as making a prior arrangement with t
carriers for this service.

"'As we stated in our letter of November 22nd, we ha
not made any arrangement with any carrier to perform t
service in accord with the provisions of Item 70 W. T.
tariff 330, which states this arrangement is to be made w
the carriers and to cover a specified period of time.

"'For this reason we decline to pay the bills and retu
them with this letter.'

. . . . . .

"On March 30th, 1936, the local agent of plaintiffs, alo
with the local agents of the various other railroads enteri
Kansas City, Missouri-Kansas, sent to the defendant a
other grain companies in Kansas City, Missouri-Kansas,

reply to the letter quoted next above, the following joint letter:

* * * * * * *

"'Western Trunk Lines Tariff No. 330-A (Kipp's I. C. C. No. A-2653, Peel's I. C. C. No. 2779, Cummins' I. C. C. No. 288) Provides, subject to qualifications stated in Items 70 and 75 thereof, that in connection with carload shipments in *bulk* (subject to that tariff) of grain, grain products and other articles taking same rates, the necessary grain doors, or lumber in lieu thereof, shall be installed by the shipper (or his agent) and at his expense.

"'Such installation contemplates the usual accessorial service in preparation of cars, such as inspection, a limited amount of cleaning and minor and inexpensive repairs required to prevent loss of grain by leakage.

"'By Item 70 of the tariff, relative to shipments for road haul movement, it is provided that at the terminal elevator points specified in the item, the railroad agent "will act as shipper's Agent and install grain doors at a charge of $1.00 per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time."

* * * * * * *

"'In order that the tariff regulations may be strictly complied with, you will advise whether you elect to have carriers furnish cars with grain doors or lumber installed, or whether you elect to install grain doors or lumber for your own account.

"'In the event you wish carrier to perform the installation service the period of time this arrangement shall be in force shall be specified.

"'If you decline to enter into an arrangement, as provided by the tariff, or if you elect to install the grain doors or lumber for your own account, the carrier will furnish cars inspected and O. K.'d for grain loading, but without grain doors or lumber installed. * * *'

"(6) It is further stipulated and agreed that the defendant returned to plaintiffs all bills rendered by plaintiffs to the defendant for the installation of grain doors in said 624 box cars, and wrote letters declining payment of the same and referring to defendant's letters to plaintiffs of November 22, 1935, and January 15, 1936, for defendant's reasons for its refusal to pay said bills.

"(7) It is further stipulated and agreed that each and all of said 624 box cars were loaded by the defendant with grain in bulk after plaintiffs installed the necessary grain doors in each of said cars, and that said 624 carload shipments in bulk, of grain, thereafter moved in due course from defendant's elevator in Kansas City, Missouri-Kansas, in interstate commerce, and that the loading point and unloading point of all said 624 carload shipments in bulk, of grain, were not within the same terminal or switching district.

"(8) It is further stipulated and agreed that plaintiffs have repeatedly demanded of the defendant payment for the installation of the said necessary grain doors in said 624 box cars, and each of them, and that the defendant has at all times refused, and still refuses, to pay for said service."

"Exhibit A", referred to in paragraph (3) of the Stipulation and Agreed Statement of Facts, reads in part as follows:

"Freight Tariff No. 330

"Rules and Regulations—Continued

Subject

Item No. 70.

Furnishing and Installing Grain Doors or Lumber for Side and End Door Barricades

"(1) Grain Doors or Lumber for necessary side door barricades (also for necessary end door barricades, if car is equipped with end doors requiring such protection) for carload shipments in bulk, of grain, grain products, seeds and other articles taking same rates, as specified in Lists Nos. 1, 2, 3, 4, 5, 6, Items Nos. 200 to 270, inclusive, will be furnished at loading stations without charge, by the initial road-haul carrier. * * * The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time: * * *

"Kansas City, * * * Mo.-Kan."

[fol. 120] Among them was a provision from a Freight Tariff, effective July 1, 1935. (See Exhibit "A" at the end of the stipulated facts). Said clause reads as follows:

"(1) Grain Doors or Lumber for necessary side door barricades (also for necessary end door barricades, if car is equipped with end doors requiring such protection) for carload shipments in bulk, of grain, grain products, seeds and other articles taking same rates, as specified in Lists Nos. 1, 2, 3, 4, 5, 6, Items Nos. 200 to 270, inclusive, will be furnished at loading stations without charge, by the initial road-haul carrier. • • • The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a [fol. 121] charge of one dollar ($1.00) per car; *prior arrangements for the service to be made with the carriers and to cover a specified period of time:* • • •

"Kansas City • • • Mo.-Kan." [Italics ours.]

It is contended by the shipper that there was no prior arrangement made by it with the carrier.

It is contended by the carrier, first: that the shipper entered into a prior arrangement with the carrier; and, second, that the shipper waived the tariff provision requiring prior arrangement because of its acceptance of the carrier's service in installing grain doors.

The clause relied upon by the carrier is contained in a letter, dated July 2, 1935, from the shipper, and reads as follows [See stipulated facts 4(a)]:

"Said undersigned parties further notify you that if ordinary box cars are furnished and supplied upon such orders they will expect them to be fully coopered or prepared with necessary side-door barricades completely installed and ready for loading."

This excerpt is taken from a letter written by the shipper to the local agents of the carriers. This excerpt gives rise to the principal questions in the case, viz.:

(1) Was there a prior arrangement between the plaintiff-carrier and the shipper relative to the service of installing the grain doors?

(2) Could such prior arrangement, if made, be waived by either party?

(3) Was there any waiver made or attempted by either party?

(4) Has the Interstate Commerce Commission exclusive jurisdiction to pass upon the question of existence of waiver

Taking up the first question, we fail to find either in the findings of fact, conclusions of law, or in the transcript of evidence apart from these, anything which would support a finding of a "prior arrangement" between the parties. On the contrary, the correspondence found in the findings of fact makes it very clear that no such prior arrangement had been made.

The clause relied upon by plaintiff-carrier, above quoted, is immediately followed by three other clauses in the same letter which remove any doubt about a "prior arrangement" [fol. 122] having been made, even if the clause above quoted were ambiguous, which we think is not the case.

The trial Court in its Memorandum uses the following language:

"Cars were furnished by plaintiffs to defendant in the number stated. The plaintiffs did install grain doors on these cars and billed the defendant at the rate of one dollar per car. Not only, however, were 'no prior arrangements for the service' of installing the grain doors in question entered into by the plaintiffs and defendant, but the defendant positively and unequivocally refused to enter into such 'arrangements.'"

The second and third questions may be treated together. They were so treated by the lower Court in its Memorandum. We quote the language used, even assuming that there was a prior arrangement.

"That the 'prior arrangements' condition of this tariff is (1) for the benefit of the carrier and (2) may be waived by the carrier was ruled by the majority of the Interstate Commerce Commission in Board of Trade et al. vs. Railway Co., et al., decided April 12, 1937. The reasoning supporting the first of these conclusions is not set out in the report. It seems to us that the conclusion is entirely arbitrary and altogether unsound.

"The $1.00 charge is unreasonably high; the Interstate Commerce Commission so ruled in the case cited. The plaintiffs now admit that in no event should they have judgment at a higher rate than sixty cents per car. Plaintiffs concede that the real value of the services rendered is not more than

sixty cents. How can it be said that it is not, in part at least, for the benefit of the shipper that he shall have the right of election between himself installing a grain door (a sixty cent job) and paying another $1.00 for doing that job. Again, how can it be said that a choice as to whether 'the railroad will act as shipper's agent' vel non is of interest only to the railroad and of no interest whatever to the shipper?

"Not only do we not agree with the majority of the Interstate Commerce Commission in the case cited that the 'prior arrangements' condition of the tariff is for the sole benefit of the carrier, but we agree with the minority of that Commission that in no event can such a condition in a tariff be [fol. 123] waived by either party. Davis v. Henderson, 266 U. S. 92."

We agree with this conclusion of the lower Court.

In the Henderson case, supra, a shipper of cattle sued the Railroad for failure to furnish a car within a reasonable time after notice. The defense was that the notice had not been given in writing as required by the tariff. Oral notice had been given by plaintiff to the station agent and accepted by him. The Supreme Court in its opinion said:

"The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff. Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 197; Missouri, Kansas & Texas Ry. Co. v. Ward, 244 U. S. 383, 388; Davis v. Cornwell, 264 U. S. 560, 562."

See also, Van Dusen Harrington Co. v. Northern Pacific Ry. Co., 32 F. (2d) 466 (C. C. A. 8), and Northern Pac. Ry. Co. v. Van Dusen Harrington Co., 60 F. (2d) 394 (C. C. A. 8); American Railway Express Company v. American Trust Co., 47 F. (2d) 16.

Furthermore, the correspondence shows that neither the Railroad Company nor the shipper ever attempted to waive the requirement in question.

The fourth question remains: Does the Interstate Commerce Commission have exclusive jurisdiction of the matter of waiver to the exclusion of the Federal Courts?

The construction of a tariff is a matter of law for the courts unless technical words are employed which must first be given an interpretation by the Commission. Where words of a tariff have an ordinary meaning, the construction of

such tariff, its effect and validity, is for the determination of the court. Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U. S. 285; Standard Oil Co. v. United States, 283 U. S. 235; Butler Motor Co. v. Atchison, T. & S. F. Ry. Co., 272 F. 683 (C. C. A. 8).

We think the judgment should be

Affirmed.

It is so ordered.

[fol. 124] DISSENTING OPINION

WOODROUGH, Circuit Judge, dissenting:

The "arrangement" required by the tariff is for the shipper to let the railroad know before shipment which one as between the two of them is to perform the service in question and for how long. Nothing else. These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time "from and after June 1, 1935." Their accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they shipped, or demurrage. If the courts require them to pay, discrimination between those who have had the service and have paid for it and those who have had it without paying for it will be avoided. Discrimination is the evil and the courts should help, not hinder, doing away with it.

[fol. 125] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11047

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees, Chicago, Rock Island and Pacific Railway Company, Appellants,

vs.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY

JUDGMENT—July 7, 1938

Appeal from the District Court of the United States for the Western District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Simmonds-Shields-Lonsdale Grain Company have and recover against Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, Chicago, Rock Island and Pacific Railway Company, the sum of Twenty Dollars for its costs herein, to be collected according to law.

[fol. 126] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

APPELLANTS' PETITION FOR REHEARING—Filed July 19, 1938

Come now Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, Chicago, Rock Island and Pacific Railway Company, appellants, and respectfully petition the court to grant them a rehearing in this cause.

The action was instituted by appellants to recover interstate freight charges from defendant Grain Company for the service of installing grain doors in cars for bulk shipment of grain at the request of the defendant. This court by a majority opinion, affirming the judgment of the District Court, has held that the tariff obligation of the shipper to pay for the service was conditioned by the tariff upon [fol. 127] compliance by the shipper with the tariff provision "prior arrangements for the service to be made with the carriers and to cover specified period of time," and that defendant shipper did not make such prior arrangements, and is not liable for the service charges provided by the tariff. Judge Woodrough in a dissenting opinion has held that the " 'arrangement' required by the tariff" was made; that defendant is liable for the tariff charges and that only by enforcement of the liability will discrimination be avoided.

The case is of importance because it is a test case involving similar claims of many carriers against many shippers and because it involves an important question of enforcement of interstate tariffs and prevention of discrimination by interstate carriers.

Appellants pray for a rehearing on the following grounds:

I.

Because the court in the majority opinion has inadvertently overlooked that by the tariff the installation of grain doors is a shippers' service in all circumstances and without qualification; that the tariff places the cost of installation on the shipper in all cases whether the installation is performed by the shipper or by an agent of the shipper; that installation is not a part of the carrying charges of the carrier; that the tariff provides that the carrier will act as agent for the shipper for the installation at a charge; that the tariff fixes a charge and the amount thereof to be paid the carrier by the shipper for the installation service by the carrier as the shippers' agent.

II

Because the court in the majority opinion has inadvertently overlooked that "the 'arrangement' required by the tariff is for the shipper to let the railroad know before shipment which one, as between the two of them, has performed the service in question and for how long. Nothing else." (Dissenting opinion of Judge Woodrough); that "the shippers unequivocally indicated their expectation 'that the railroad would perform the service and fixed the time from and after June 1, 1935.'" (Dissenting opinion of Judge Woodrough); that the shippers' "accompanying threat not to pay for the service was brutum fullem—as though they had said they would not pay the freight on the goods shipped." (Dissenting opinion of Judge Woodrough) [fol. 128] that therefore all the requirements of the tariff for prior arrangements were fully met.

III

Because the court in the majority opinion has inadvertently overlooked that the obligation to pay for the service when performed by the carrier as the shipper's agent (subject only to reduction by the Interstate Commerce Commission) was fixed by the tariff as a matter of law and not subject to private contract or waiver between the parties and that the avoidance of unlawful discrimination demands that the shipper be required to pay the tariff charge (as reduced by the Interstate Commerce Commission to 60 cents

per car). 49 U. S. C. A., Sections 1 (6), 2, 6 (7), 10 (1) (2) (4), 41 (1); Pittsburgh, etc. R. R. Co. v. Fink, 250 U. S. 577, 582-3, 40 S. Ct. 27, 28; Robinson v. Ry., 233 U. S. 173, 180-1, 34 S. Ct. 556, 558; Loomis v. Lehigh Valley Ry., 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30; Hines v. Richards Co., 290 Fed. 162, 164, (C. C. A. 4); Wabash Railway Co. v. Horn, 40 Fed. (2d) 905, 906, (C. C. A. 7); Menasha Paper Co. v. Chicago & N. W. Ry. Co., 241 U. S. 55, 58-60, 36 S. Ct. 501, 503-4. The Elkins Act, Title 49, Sec. 41 (1) (1906), reads in this connection as follows:

"And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced."

The majority opinion construes the tariff as permitting the shipper to request, receive and accept the extra service of the carrier offered by the tariff without paying the tariff charge therefor.

IV

Because the court in the majority opinion has inadvertently overlooked that the performance by the plaintiff of the shippers' service to the defendant of installation of grain doors without the payment to the plaintiffs of the charges fixed by the tariff against the shippers in the case of the performance of the service by the carrier would necessarily constitute discrimination in favor of the [fol. 129] defendant shipper, and this, regardless of what the defendant shipper said about paying for the service. Statutes and decisions cited Ground III, supra.

V

Because the court in the majority opinion has inadvertently overlooked that the demand of the defendant shipper that plaintiffs install grain doors made it the duty of the plaintiffs, under the tariff, to perform the service as agent for the defendant, Menascha Paper Co. v. Chicago & N. W.

Railway Co., 241 U. S. 55, 59-60, 36 S. Ct. 501, 503-4, a
that the shippers' "accompanying threat not to pay
the service was brutum fullem—as though they had s
they would not pay the freight on the goods they shipped
(Dissenting opinion of Judge Woodrough). Statutes a
decisions cited Ground III, supra.

VI

Because the court in the majority opinion has also in
vertently overlooked that the performance of the shippe
service of grain door installation by the carrier and
acceptance and the shipping of the cars so serviced r
dered the shipper liable under the tariff and requires p
ment in order to prevent discrimination, regardless of pr
arrangements by the shipper. 49 U. S. C. A. Sec. 10, (
(2), (4). Davis, Director-General of Railroads v. Oil C
285 Fed. 470, 472-3, (C. C. A. 4); American Railway Co.
Lindenburg, 260 U. S. 584, 591-2, 43 S. Ct. 206, 209; a
Statutes and decisions cited Ground III, supra.

Appellants respectfully aver that it appears from t
majority opinion that the matters of law and fact set
in the foregoing grounds were inadvertently overlooked
the majority of the court; that all of said matters are m
terial and were duly relied upon and in substance present
by appellants in their brief and oral argument upon the s
mission of the cause to this court.

Wherefore, appellants respectfully pray that their pe
tion be sustained and rehearing be granted.

Cyrus Crane, George J. Mersereau, Dean Wo
Charles M. Miller, John E. Du Mars, Wright C
rad, Hale Houts, Counsel for Appellants.

[fol. 130] We, Dean Wood, Charles M. Miller and H
Houts, hereby certify that we are counsel for Frank
Lowden, James E. Gorman and Joseph B. Fleming, Tr
tees, Chicago, Rock Island and Pacific Railway Compa
the appellants in the above entitled action, and that t
foregoing petition for rehearing is not presented for t
purpose of delay or vexation but is in our opinion w
founded in law and fact and proper to be filed herein.

Dean Wood, Charles M. Miller, Hale Houts, Coun
for Appellants.

[File endorsement omitted.]

[fol. 131] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—August 4, 1938

The petition for rehearing filed by counsel for appellants in this cause having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF APPELLANTS FOR STAY OF MANDATE—Filed August 15, 1938

Come now Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, Chicago, Rock Island and Pacific Railway Company, appellants in the above entitled cause, and show to this court that they desire stay of the mandate of the court herein for the purpose of and pending application by appellants to the Supreme Court of the United States for a writ of certiorari to review the judgment of the court herein.

Wherefore, appellants pray that the mandate of this court be stayed and withheld until the 14th day of September, 1938.

Dated August 11, 1938.

Cyrus Crane, George J. Mersereau, Dean Wood, Charles M. Miller, John E. Du Mars, Wright Conrad, Hale Houts, Counsel for Appellants.

[File endorsement omitted.]

[fol. 132] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—August 15, 1938

On Consideration of the motion of appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if

within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 133] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,827. U. S. Circuit Court of Appeals, Eighth Circuit, Term No. 342. Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, Chicago, Rock Island and Pacific Railway Company, petitioners, vs. Simonds-Shields-Lonsdale Grain Company. Petition for a writ of certiorari and exhibit thereto. Filed September 12, 1938. Term No. 342, O. T., 1938.

FILED
SEP 12 1938
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

In the Supreme Court
of the
United States
OCTOBER TERM, 1937.

No. 342

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION,
PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(Filed.....)

CHARLES M. MILLER,
CYRUS CRANE,
GEO. J. MERSEREAU,
DEAN WOOD,
WRIGHT CONRAD,
HALE HOUTS,
Counsel for Petitioners.

FRANK T. RILEY PUB. CO. KANSAS CITY, MO.

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In the Supreme Court
of the
United States
OCTOBER TERM, 1937.

No.....

RANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

MONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

TITION FOR WRIT OF CERTIORARI TO THE JNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

the Honorable Charles Evans Hughes, Chief Justice f the United States Supreme Court, and to the Associate Justices of the United States Supreme Court:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

The involved action was brought in the District rt of the United States for the Western District of

Missouri by petitioners, as trustees of the Chicago, Rock Island & Pacific Railway Company, against respondent, Simonds-Shields-Lonsdale Grain Company, to recover for services of the trustees in installing grain doors in box cars in which grain in bulk was shipped in interstate commerce by respondent. For convenience, petitioners will be referred to as "plaintiff carrier" and respondent as the "shipper." Judgment was for the shipper in the District Court on the appeal of plaintiff carrier, and the Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court (R. 123, 124), by a vote of two members, with Judge Woodrough dissenting. Petition for rehearing was denied August 4, 1938, (R. 131). The case was tried to the court upon formal waiver of a jury. The facts were largely stipulated, (R. 57 to 73), and the District Court found the facts as stipulated, (R. 104).

Grain doors are wooden barriers placed inside of box car doors to prevent bulk grain loaded into the cars from leaking out of the doors, (R. 76-7, 93-4). Plaintiff carrier sued for the installation of grain doors at Kansas City, during the period of July 5, 1935 to February 29, 1936, in 624 box cars placed by plaintiff carrier for loading at the shipper's elevator, loaded with bulk grain by the shipper and transported for it in interstate commerce, (R. 63, 70).

Prior to July 1, 1935 all carriers installed grain doors, at Kansas City and other terminal elevator points, in cars transported by them, without separate charge to the shippers for such installation, and there was no tariff provision for a charge by the carrier for such service. Effective July 1, 1935 a new tariff provision was added to the freight tariffs filed with the Interstate Commerce Commission which provided that the installa-

on of grain doors should be a service performed by r at the expense of the shipper. The provision in uestion, identified as Item 70 of Western Trunk Lines ariff, No. 330 (R. 59) reads as follows:

> "The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time: * * * Kansas City—Mo.-Kan."

In proceedings before the Interstate Commerce Commission attacking the provision, the Commission held e provision reasonable except for the amount of the arge, and that sixty cents (60c) per car instead of e dollar ($1.00) per car was and in the future would e a reasonable charge (R. 82, 86). (220 I. C. C. 753). ollowing the ruling of the Commission, and prior to e trial, plaintiff carrier reduced the amount sued for om $1.00 per car to 60c per car, and by requested eclaration of law at the trial sought judgment for such nount (R. 104). The tariff provision in question reained in effect throughout the period sued for (R. , 75, 73).

The shipper by its answer (1) attacked the tariff ovision as unreasonable and (2) averred that it was t liable in any event because there had not been "prior rangements for the service" withm the meaning of the riff provision (R. 46-7).

One day after the tariff provision became effective, July 2, 1935, defendant shipper and other shippers ote plaintiff carrier and other carriers that regards of the tariff provision in question, the shippers

expected the carriers "to continue from and after July 1, 1935, as before said date, to furnish and supply them upon orders for cars to load and ship bulk grain, such equipment for such purpose as is suitable safely to carry bulk grain", and that if ordinary box cars were furnished upon such orders, the shippers would "expect them to be fully coopered or prepared" with grain doors; that "regardless of the tariff items" the shippers declined and would decline to pay any charges whatsoever" for the installation of grain doors in cars tendered for loading the bulk grain; that if the carriers did not install grain doors in such cars, the shippers would "demand reimbursement in full together with interest for each and every" expenditure for the installation of grain doors by the shipper (R. 60-61).

In reply to the shippers' letter of July 2, 1935, plaintiff carrier and the other carriers protested that the installation by them of grain doors without the shippers paying the tariff charges would be a violation of law, and stated that unless "unqualified arrangements" were made it would be necessary to provide the cars which did not have grain doors installed. By further correspondence the shippers continued to demand that the carriers install grain doors without charge, and the carriers continued to protest that the tariff required the shippers to pay the carriers for the service of installing grain doors when performed by the carrier at the request of the shipper (R. 62-66). Following the shipper's letter of July 2, 1935, and during the period of July 5, 1935, to February 29, 1936, plaintiff carrier in fact installed grain doors in the cars in question, and made demand upon the shipper for the payment of the charge provided by the tariff (R. 63-4). The shipper loaded and shipped the cars so equipped but refused to pay the charges demanded (R. 64, 66).

In both the District Court (R. 104-5) and in the Circuit Court of Appeals, (R. 125-8) plaintiff carrier took the position the shipper was liable both because the shipper's letter of July 2, 1935, constituted "prior arrangements" for a definite period under the tariff, and because if there were not prior arrangements in strict compliance with the tariff, such arrangements were unnecessary or waived and the shipper liable for the charge by reason of the shipper's ordering the installation of the grain doors, the carrier's performing it and the shipper's accepting, loading and shipping of the cars with the installation so performed.

The District Court by memorandum opinion (R. 111-12) and the Circuit Court of Appeals for its majority opinion held that the shipper's request that the plaintiff carrier install the doors from and after July 1, 1935 accompanied by the shipper's statement that it would not pay for the service was not a prior arrangement within the meaning of the tariff, and that the making of a prior arrangement was a condition precedent to the accrual of the charge and could not be and was not waived by the shipper (R. 116, 121).

Differing with the majority opinion of the Circuit Court of Appeals, Judge Woodrough in his dissenting opinion held: (R. 123).

> "The 'arrangement' required by the tariff is for the shipper to let the railroad know before shipment which one as between the two of them is to perform the service in question and for how long. Nothing else. These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935'. Their accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods

they shipped. If the courts require them to pay, discrimination between those who have had the service and have paid for it and those who have had it without paying for it will be avoided. Discrimination is the evil and the courts should help, not hinder, doing away with it."

Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals in holding in effect that the shipper could order and demand that the carrier install grain doors from and after July 1, 1935, and by at the same time refusing to pay the tariff charge for the service when performed by the carrier, prevent the order from constituting a "prior arrangement" within the meaning of the tariff, and escape liability for the tariff charge, has decided an important precise question of Federal Law which has not been but should be settled by this court.

2. In holding in effect that the shipper could order and demand that the carrier install grain doors from and after July 1, 1935, and by at the same time refusing to pay the tariff charges for the installation when performed by the carrier, prevent the order from constituting a prior arrangement within the meaning of the tariff, and escape liability for the charges, the Circuit Court of Appeals of the Eighth Circuit has rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit on the same matter of the obligation to pay the tariff rate for services received under the tariff, *Wabash R. R. Co.* v. *Horn*, 40 Fed. (2d) 905, 906 (C. C. A. 7), in which it was held that one who becomes the owner of a car in transit and by letter orders a reconsignment of the car by the carrier could not prevent liability for freight charges

tating in the letter that all charges were to follow car.

Said decision conflicts in the same respect with the wing cases: *China Fire Ins. Co.* v. *Davis*, 50 Fed. 389, C. C. A. 2, 390, 392; *Western Grain Co.* v. *way Co.*, 56 Fed. (2d) 160, C. C. A. 5, 162; *Davis, ctor General of Railroads* v. *Oil Co.*, 285 Fed. 470, . A. 4, 472-3.

3. The Circuit Court of Appeals in holding that shipper's letter of July 2, 1935 did not constitute ior arrangement within the meaning of the tariff, in refusing to hold, as held in the dissenting opinion udge Woodrough, that "the 'arrangement' required he tariff is for the shipper to let the railroad know re shipment which one as between the two of them perform the service in question and for how long"; the "shippers unequivocally indicated their ex- tion that the railroad would perform the service and l the time 'from and after June 1, 1935' "; and "their accompanying threat not to pay for the ce was brutum fulmen—as though they had said they d not pay the freight on the goods they shipped". decided a Federal question in a way probably in ict with applicable decisions of this court, to-wit: *burgh, etc. R. R. Co.* v. *Fink*, 250 U. S. 577, 581-3, Ct. 27, 28; *N. Y. C. R.* v. *York, etc. Co.*, 256, U. S. 408, 41 S. Ct. 509, 510; *Loomis* v. *Lehigh Valley R.* o., 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30; *Penn.* o. v. *International Coal Co.*, 230 U. S. 184, 197, 33 . 893, 896; and *Robinson* v. *B. & O. R. Co.*, 222 U. S. 509, 32 S. Ct. 114-115; to the effect that carrier's es are fixed by the tariff and the carrier is re- d to collect and the shipper to pay the full charges d in the tariff filed by the carrier with the Inter-

state Commerce Commission, and *Menasha Paper Co.* *Chicago & Northwestern Ry. Co.*, 241 U. S. 55, 59-6 36 S. Ct. 501, 503-4, to the effect that demand by t shipper for service offered by the tariff makes it t duty of the carrier to perform the service.

4. The Circuit Court of Appeals in holding t shipper was not liable for the tariff charges after havi ordered the carrier to perform the service as offer by the tariff, and having accepted the installation of t doors by plaintiff carrier and loaded and shipped t cars, has decided a Federal question in a way probab in conflict with the applicable decisions of this cou to-wit: *Great Northern Ry. Co.* v. *Delmar*, 283 U. 686, 690-1, 51 S. Ct. 579, 581, and *American Railway E press Co.* v. *Lindenburg*, 260 U. S. 584, 588-90, 43 S. C 206, 208-9, to the effect that the tariff will be construed avoid discrimination rebates and preference and *Pitt burgh, etc. R. R. Co.* v. *Fink*, 250 U. S. 577, 581-3, 40 Ct. 27, 28; *N. Y. C. R.* v. *York, etc. Co.*, 256 U. S. 40 408, 41 S. Ct. 509-510; *Loomis* v. *Lehigh Valley R. Co.*, 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30; *Armo Packing Co.* v. *United States*, 209 U. S. 56, 71-2, 28 Ct. 428, 431; *Menasha Paper Co.* v. *Chicago & North western Ry. Co.*, 241 U. S. 55, 59-60, 36 S. Ct. 501, 503- and other cases, to the effect that the avoidance by shipper of the payment of tariff charges fixed for service rendered by the carrier under the tariff co stitutes unlawful discrimination under the Interstat Commerce Act.

5. The Circuit Court of Appeals in refusing t hold that regardless of whether there was a prior a rangement strictly within the terms of the tariff, th shipper having ordered the installation of the doors, th carrier having performed the installation and the shi

per having accepted, loaded and shipped the cars with the doors installed, was not liable for the tariff charges, has decided a Federal question in a way probably in conflict with the applicable decisions of this court, to-wit: *Pittsburgh, etc. R. R.* v. *Fink*, 250 U. S. 577, 582-3, 40 S. Ct. 27, 28; and *N. Y. C. R.* v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510, to the effect that a consignee who receives delivery of a shipment accepts the service of carriage and becomes liable for the tariff charges.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals in the case numbered and entitled on its docket Number 11047, "Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of Chicago, Rock Island and Pacific Railway Company, a corporation, Appellants, vs. Simonds-Shields-Lonsdale Grain Company, a corporation, Appellee", to the end that this cause may be reviewed and determined by this court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the court, and your petitioners pray that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, which is filed as a part of and as an exhibit to the petition may be treated as a return to said Writ of Certiorari; and your petitioners pray that they may have such other and further remedies in the premises as to the court may seem appropriate

and in conformity with law; and your petitioners will ever pray.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, Chicago, Rock Island and Pacific Railway Company, a Corporation,

Petitioners,

CHARLES M. MILLER,
CYRUS CRANE,
GEO. J. MERSEREAU,
DEAN WOOD,
WRIGHT CONRAD,
HALE HOUTS,

Counsel for Petitioners.

In the Supreme Court
of the
United States

OCTOBER TERM, 1937.

No.....

RANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

IMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURT BELOW.

The opinions (R. 116, 123) of the Circuit Court of ppeals are not yet reported. The opinion of the Dis-ct Court (R. 111-3) is reported 19 Fed. Supp. 438.

II.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

a. Statutory Provisions Believed to Sustain the Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A., Section 347 (a), page 359), and under the same Act, c. 229, Section 8, 24 Stat. 940 (28 U. S. C. A. Section 350, page 376). The case originated in the United States District Court under the Acts of March 3, 1911, c. 231, Section 24, par. 8, 36 Stat. 1092 and October 22, 1913, p. 32, 38 Stat. 219 (28 U. S. C. A., Section 41 (8), p. 594), as a suit arising under the Interstate Commerce Act, more particularly referred to hereinafter and quoted in the Appendix, post.

b. The Date of the Judgment to be Reviewed.

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court was entered July 7, 1938 (R. 116, 124) and appellants' petition for rehearing was denied and the judgment by the Circuit Court of Appeals became final August 4, 1938 (R. 131). This petition for certiorari and supporting transcript of record are filed in this court within three months from August 4, 1938.

c. Nature of the Case and of the Rulings of the Circuit Court of Appeals Relied Upon as Basis of This Court's Jurisdiction.

The case was an action by plaintiff carrier to recover the charges provided by the freight tariff on file

with the Interstate Commerce Commission for service rendered for the shipper of installing grain doors in box cars for interstate shipment of bulk grain by the shipper under a tariff provision providing that grain doors "shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time; * * * Kansas City . . . . . Mo.-Kan."

The Circuit Court of Appeals by its majority opinion held that a letter from the shipper to the carrier directing the carrier to install grain doors from and after July 1, 1935, but also stating that the shipper would not pay the tariff charge therefor, did not constitute a prior arrangement within the meaning of the tariff; that a prior arrangemen' was a condition precedent to liability by the shipper, and that the shipper was not liable for the charge, although following the letter the doors were installed by plaintiff carrier, and the cars thereafter accepted, loaded, and shipped in interstate commerce by the shipper. The majority of the court refused to hold, as was held by Judge Woodrough in a dissenting opinion, that the only arrangement required by the tariff was for the shipper to let the railroad know "before shipment which one as between the two of them is to perform the service in question and for how long"; and that the shipper "unequivocally indicated" its expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935' "; that the "accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they

had shipped;'' that discrimination would be avoided by requiring the shipper to pay.

d. Cases Believed to Sustain the Jurisdiction of this Court.

Menasha Paper Co. v. *Chicago & Northwestern Ry.*, 241 U. S. 55, 59-60, 36 S. Ct. 501, 503-4.

Pittsburgh R. R. Co v. *Fink*, 250 U. S. 577, 581-3, 40 S. Ct. 27, 28.

N. Y. C. R. v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510.

Loomis v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30.

Pennsylvania R. Co. v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 895.

Robinson v. *B. & O. R. R. Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115.

Great Northern Ry. Co. v. *Delmar*, 283 U. S. 686, 690, 51 S. Ct. 579, 581.

Wabash R. R. Co. v. *Horn*, 40 Fed. (2d) 905, 906 (C. C. A. 7).

III.

STATEMENT OF THE CASE.

Petitioners have stated the case in the "Summary Statement of the Matter Involved", Part "I" in the foregoing petition for certiorari, which is adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in affirming the judgment of the District Court in favor of defendant shipper.

(2) The Circuit Court of Appeals erred in not holding that the shipper's letter of July 2, 1935, demanding plaintiff carrier to install grain doors from and after July 1, 1935, was not a prior arrangement within the meaning of the tariff and rendering the shipper liable for the tariff charges, although the shipper in the same letter stated that it would not pay the charges.

(3) The Circuit Court of Appeals erred in not holding that the shipper's request for the installation of the grain doors, compliance therewith by the carrier and the shipper's acceptance, loading and shipping of the cars in interstate commerce, rendered the shipper liable for the tariff charges, regardless of whether there was a prior arrangement within the strict terms of the tariff provision.

ARGUMENT.

Summary of the Argument.

POINT A.

The tariff made the installation of grain doors a service to be performed by or at the expense of the shipper in all cases, and by the carrier only as agent for the shipper and for a charge specifed by the tariff and not included in the other transportation charges. The performance of the service by the carrier without charge would constitute unlawful discrimination.

Since the carrier could not lawfully agree to perform the service free of charge for the shipper, the same result cannot be accomplished by indirection.

POINT B.

The only prior arrangement required by the tariff was for the shipper to request or demand that the carrier install the grain doors as the agent of the shipper. The shipper's liability for and the amount of the charges was not the subject of the arrangement but was fixed by the tariff and therefor by law. There was a complete "prior arrangement" under the tariff.

POINT C.

The installation of grain doors by the carrier at the request of the shipper and the shipper's acceptance of the installations and loading and shipping of the cars in interstate commerce rendered the shipper liable for the tariff charges under the Interstate Commerce Act requiring uniform payment of all tariff charges and the prohibiting of discrimination, regardless of the manner and form of prior arrangement.

POINT D.

Jurisdictional grounds for review are presented.

POINT A.

The tariff made the installation of grain doors a service to be performed by or at the expense of the shipper in all cases, and by the carrier only as agent for the shipper and for a charge specifed by the tariff and not included in the other transportation charges. The performance of the service by the carrier without charge would constitute unlawful discrimination.

Prior to July 1, 1935, the installation of grain doors at Kansas City and other terminal points had been a carrier service performed by the carrier as a part of the transportation and absorbed in the transportation charges. The tariff provision in question which went into effect July 1, 1935, still required the carrier to furnish material for grain doors but made the service of installation a shipper's service, that is to say a service to be performed by the shipper itself or through an agent in all cases, and in all cases at the expense of the shipper. Under the tariff the carrier was offered as an agent for the shipper for the purpose of installation of grain doors upon the payment of the charge therein specified of One Dollar ($1.00) per car. For convenience we repeat the quotation of the specific tariff provision:

> "The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time:
>
> * * * Kansas City - - - - Mo.-Kan."

The only circumstances under which the tariff permitted the carrier to perform the installation service were as the agent of the shipper and for the tariff compensation. The tariff, when it was on file, and as long as it was not disapproved by the Interstate Commerce Commission, had the effect of a statute. *Pennsylvania R. R. Co.* v. *International Coal Company*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; *Robinson* v. *B. & O. Railroad Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115. Prior to the trial of the case at bar the provision was expressly approved by the Interstate Commerce Commission as reasonable, except as to the amount of the charge, which was reduced from one dollar ($1.00) per car to sixty cents (60c) per car. (R. 82, 86), 220 I. C. C. 753. Interstate Commerce Commission Report was in evidence (R. 73), and the finding and ruling was available to all shippers and carriers regardless of whether they were parties to the particular proceedings. *A. J. Phillips Co.* v. *Grand Trunk Western Railway*, 236 U. S. 662, 665, 35 S. Ct. 444, 445. Plaintiff carrier reduced the amount sued for from one dollar ($1.00) per car to sixty cents (60c) per car and sought judgment for the latter amount. (R. 104).

The Interstate Commerce Commission held "that when, at the request of the shipper the carrier installs the grain doors, it is entitled to a reasonable charge for the service rendered." (R. 82). The decision of the Circuit Court of Appeals is in conflict with this ruling of the Interstate Commerce Commission as well as with the decisions of this court and the Circuit Court of Appeals relied upon by petitioners.

Since under the tariff plaintiff carrier could perform the service of installation of grain doors only as the agent of the shipper, and at a specific charge in ad-

dition to the other freight charges, to permit the shipper to receive the benefit of the installation by the carrier without requiring the shipper to pay the charge, necessarily would be to permit unlawful discrimination under the Interstate Commerce Act which requires uniform payment of all tariff charges, 49 U. S. C. A. Sections 2, 6 (7), 10 (1) (2) (4) and prohibits preference or discrimination in any form or by any device, 49 U. S. C. A. Section 41 (1) quoted in Appendix Post. *Pittsburgh R. R. Co.* v. *Fink*, 250 U. S. 577, 581-3, 40 S. Ct. 27, 28; *N. Y. C. R.* v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; and *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584, 589-90; 43 S. Ct. 206, 208-9.

If your petitioners in response to the shippers' letter of July 2, 1935, (R. . .) had agreed with the shippers to disregard the tariff and perform the service without charge, as demanded by the shippers in said letter, any such agreement would be null and void and the proper charge would nevertheless accrue under the foregoing decisions of this Court. Since the charge could not therefore be escaped directly by the shipper with the railroads, it is submitted they cannot escape the charge indirectly.

It is the control placed in the shipper to defeat the charge at will, resulting from the decision of the Circuit Court in this case, that establishes a precedent for avoiding uniformity in tariff charges invariably required in the foregoing decisions of this Court. Also see. *China Fire Ins. Co.* v. *Davis*, 50 Fed. (2d) 389,

C. C. A. 2, 390, 392; *Western Grain Co.* v. *Railway Co.*, 56 Fed. (2d) 160, C. C. A. 5, 162; *Davis, Director General of Railroads* v. *Oil Co.*, 285 Fed. 470, C. C. A. 4, 472-3.

The shipper's letter of July 2, 1935, demanding that the carrier install grain doors, in view of the tariff provision providing that the carrier would act as shipper's agent for that purpose, for a tariff charge, made it the duty of the shipper to install the grain doors. *Menasha Paper Co.* v. *Chicago & Northwestern Ry. Co.*, 241 U. S. 55, 59-60, 36 S. Ct. 501, 503-4. When the carrier performed the service it performed a legal obligation and was in no sense a volunteer. The tariff put upon the shipper the corresponding obligation to pay for the service so performed.

Doubtless if the carrier had installed the grain doors without any request from the shipper, the shipper would have been privileged to refuse the cars and the carrier would have been and remained a mere volunteer. Since in the case at bar, the shipper demanded that the carrier install the doors, accepted the cars after the installation, and loaded and shipped them in interstate commerce, the installation of the doors by the carrier can not be regarded other than a service by the carrier as agent of shipper under the tariff and for which the shipper is by law required to pay the tariff charges.

In *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30, it was held that absent a tariff provision requiring the carrier to absorb the expense of grain door installation, the shipper could not perform the installation and recover the expense thereof from the carrier. The attempt of the shipper in the case at bar to avoid payment of the installation per-

formed by the carrier at the request of the shipper, under the tariff placing the expense of installation in all cases on the shipper, is an attempt by the shipper to violate the express provisions of the tariff and an even stronger case in the favor of the carrier than the Loomis case.

POINT B.

The only prior arrangement required by the tariff was for the shipper to request or demand that the carrier install the grain doors as the agent of the shipper. The shipper's liability for and the amount of the charges was not the subject of the arrangement but was fixed by the tariff and therefor by law. There was a complete "prior arrangement" under the tariff.

Since the tariff made installation of grain doors a service to be performed by and at the expense of the shipper in all cases and by the carrier only as agent of the shipper and for compensation provided by the tariff (Point A *supra*) the only arrangement to be made by the shipper with the carrier, under the tariff, to render the shipper liable for the tariff charges, was a request or demand by the shipper that the carrier act as his agent to install grain doors. The tariff, and therefore the law, fixed the obligation and amount of the charge and neither the obligation nor the amount was a matter for negotiation or arrangement by the shipper.

Pittsburgh R. R. Co. v. *Fink*, 250 U. S. 577, 581-3, 40 S. Ct. 27, 28; *N. Y. C. R.* v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; and *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115.

Manifestly the letter of July 1 whereby the shipper demanded that the carrier install the grain doors from

and after July 1, 1935, was a complete prior arrangement within the meaning of the tariff rendering the carrier liable for the tariff charge for the grain door installations by the plaintiff carrier following the letter and during the period of July 5, 1935 to February 29, 1936. Any other construction of tariff or holding as to the sufficiency of the letter permits unlawful discrimination. The whole matter, both in reasoning and in result, was distinctly, ably and tersely stated by Judge Woodrough in his dissenting opinion, (R. 123):

> "The 'arrangement' required by the tariff is for the shipper to let the railroad know before shipment which one as between the two of them is to perform the service in question and for how long. Nothing else. These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935'. Their accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they shipped. If the courts require them to pay, discrimination between those who have had the service and have paid for it and those who have had it without paying for it will be avoided. Discrimination is the evil and the courts should help, not hinder, doing away with it."

POINT C.

The installation of grain doors by the carrier at the request of the shipper and the shipper's acceptance of the installations and loading and shipping of the cars in interstate commerce rendered the shipper liable for the tariff charges under the Interstate Commerce Act requiring uniform payment of all tariff charges and the prohibiting of discrimination, regardless of the manner and form of prior arrangement.

While it is believed that the case is properly disposed of on the ground that there was a complete prior

arrangement within the meaning of the tariff, it is further submitted that regardless of that question, the requirement of the Interstate Commerce Act that all shippers alike pay interstate tariff charges on all services of and connected with interstate transportation, and the prohibition against discrimination in any form or any device, rendered the shipper liable as a matter of law for the tariff charges for the installation in question, upon the undisputed facts that the installation was requested by the shipper, was performed by the carrier, was accepted by the shipper, and the cars so equipped loaded and shipped in interstate commerce by the shipper.

The decisions of this court in *Pittsburgh etc. R. R. v. Fink*, 250 U. S. 577, 582-3, 40 S. Ct. 27, 28; *N. Y. C. R. R. v. York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510, to the effect that a consigner accepting an interstate shipment becomes liable for all of the tariff charges, it is submitted, are authority for the proposition that the shipper is liable regardless of whether there was a prior arrangement within the technical meaning of the tariff.

POINT D.

Jurisdictional grounds for review are presented.

It is believed that the question of whether the shipper may ask for and accept service by the carrier offered by the tariff and by refusing to pay therefore escape liability for the charge fixed by the tariff for the service, is an important and precise question of Federal law which has not been but should be settled by this court. (Petition, I, *supra*, 1.) It is believed that in holding that the shipper can so escape the charge, the Circuit Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of the Cir-

cuit Court of Appeals for the Seventh Circuit in *Wabash R. R.* v. *Horn*, 40 Fed. (2d) 905-906 (C. C. A. 7) in which it was held that one who becomes the owner of a car in transit and by letter orders reconsignment of the car by carrier could not prevent liability for freight charges by stating in the letter that all charges were to follow the car. (Petition, II, 2, *supra*).

It is believed that in holding that the letter demanding that the carrier perform the service did not constitute a prior arrangement within the tariff and render the shipper liable, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court. (Petition III 3, *supra*); and in holding that the shipper is not liable for the service ordered, performed and accepted, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of the court (Petition II, 4 *supra*), and regardless of whether there was a prior arrangement technically complying with the tariff provisions (Petition II, 5 *supra*.)

CONCLUSION.

It is therefore respectfully submitted that the case is one calling for the exercise by this court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing the said decision.

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GEO. J. MERSEREAU,
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WRIGHT CONRAD,
HALE HOUTS,
Counsel for Petitioners.

APPENDIX.

Statutes Involved.

Section 2, 49 U. S. C. A. p. 137 (1920) (Transportation Act of Feb. 28, 1920, C. 91, §404, 41 Stat. 479).

Sec. 2. *Special rates and rebates prohibited.* If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, c. 104, Sec. 2, 24 Stat. 379; Feb. 28, 1920, c. 91, Sec. 404, 41 Stat. 479.)

* * * * *

Section 6 (7), 49 U. S. C. A.—p. 283 (1920) (Transportation Act of Feb. 28, 1920, c. 91, §411, 41 Stat. 483.)

Sec. 6, par. (7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of pas-

sengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time: nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * *

Section 41 (1), U. S. C. A., p. 308 (1906) Elkins Act as amended by Hepburn Act of June 29, 1906, c. 3591, §2, 34 Stat. 587).

Section 41. *Liability of corporation carriers and agents; offenses and penalties.* (1) Liability of corporation common carriers; offenses; penalties; jurisdiction. Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under Sections 41, 42, or 43, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by Sections 41, 42, or 43, with reference to such persons, except as such

penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000; Provided, That any person, or any officer or director of any corporation subject to the provisions of Sections 41, 42, or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district

in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Section 10 (1), (2) and (4), 49 U. S. C. A., p. 354-6 (Transportation Act of February 28, 1920, c. 91, Sec. 414, 41 Stat. 483).

(1) *Violation by carrier or officer; penalty.* Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the juridiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense; *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates,

fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

(2) *False billing or classification by carrier; penalty.* Any common carrier subject to the provisions of this chapter, or whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

(4) *Inducing unjust discrimination; penalty; liability for damages.* If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid

or abet any common carrier in any such unjust dis
crimination, such person or such officer or agent o
such corporation or company shall be deemed guilty
of a misdemeanor, and shall, upon conviction thereo
in any court of the United States of competent juris
diction within the district in which such offense wa
committed, be subject to a fine of not exceeding $5,000
or imprisonment in the penitentiary for a term of no
exceeding two years, or both, in the discretion of the
court, for each offense; and such person, corporation
or company shall also, together with said common carrier
be liable, jointly or severally, in an action to be brough
by any consignor or consignee discriminated against in
any court of the United States of competent jurisdiction
for all damages caused by or resulting therefrom.

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In the Supreme Court
of the
United States

OCTOBER TERM, 1938.

No. 342

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF PETITIONERS.

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PRINCE F. KELLY PUB. CO. KANSAS CITY, MO.

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No. 342

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF PETITIONERS.

I.

OPINIONS OF COURT BELOW.

The opinions (R. 89, 100) of the Circuit Court of Appeals are reported, *Lowden et al.* v. *Simonds-Shields-Lonsdale Grain Co.*, 97 Fed. (2d) 816. The opinion of the District Court (R. 86) is reported, *Lowden et al.* v. *Simonds-Shields-Lonsdale Grain Co.*, 19 Fed. Supp. 438.

II.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

a. Statutory Provisions Believed to Sustain the Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A., Section 347 (a), page 359), and under the same Act, c. 229, Section 8, 43 Stat. 940 (28 U. S. C. A. Section 350, page 376). The case originated in the United States District Court under the Acts of March 3, 1911, c. 231, Section 24, par. 8, 36 Stat. 1092 and October 22, 1913, p. 32, 38 Stat. 219 (28 U. S. C. A., Section 41 (8), p. 594), as a suit arising under the Interstate Commerce Act, more particularly referred to hereinafter and quoted in the Appendix, post.

b. The Date of the Judgment to be Reviewed.

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court was entered July 7, 1938 (R. 100) and appellants' petition for rehearing (R. 101) was denied and the judgment by the Circuit Court of Appeals became final August 4, 1938 (R. 105). Petitioners' petition for certiorari and supporting transcript of record were filed in this court on September 12, 1938, and the petition was granted on October 17, 1938 (R. 106).

c. Nature of the Case and of the Rulings of the Circuit Court of Appeals Relied Upon as Basis of This Court's Jurisdiction.

The case was an action (R. 2-25) by plaintiff carrier to recover the charges provided by the freight tariff on file with the Interstate Commerce Commission for service rendered for the shipper of installing grain doors in box cars for interstate shipment of bulk grain by the shipper under a tariff provision (R. 39, 50A) providing that grain doors "shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time; * * * Kansas City . . . Mo.-Kan."

The Circuit Court of Appeals by its majority opinion (R. 89) held that a letter from the shipper to the carrier (R. 40-2, 43) directing the carrier to install grain doors from and after July 1, 1935, but also stating that the shipper would not pay the tariff charge therefor, did not constitute a prior arrangement within the meaning of the tariff; that a prior arrangement was a condition precedent to liability by the shipper, and that the shipper was not liable for the charge, although following the letter the doors were installed by plaintiff carrier, and the cars thereafter accepted, loaded, and shipped in interstate commerce by the shipper (R. 43). The majority of the court (R. 89) refused to hold, as was held by Judge Woodrough in a dissenting opinion (R. 100), that the only arrangement required by the tariff was for the shipper to let the railroad know "before shipment which

one as between the two of them is to perform the service in question and for how long"; and that the shipper "unequivocally indicated" its expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935'" that the "accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they had shipped;" that discrimination would be avoided by requiring the shipper to pay.

d. Cases Believed to Sustain the Jurisdiction of This Court.

Menasha Paper Co. v. *Chicago & Northwestern Ry.*, 241 U. S. 55, 59-60, 36 S. Ct. 501, 503-4.

Pittsburgh, etc. R. R. Co. v. *Fink*, 250 U. S. 577, 581-3, 40 S. Ct. 27, 28.

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Wabash R. R. Co. v. *Horn*, 40 Fed. (2d) 905, 906 (C. C. A. 7).

III.

STATEMENT OF THE CASE.

The involved action was brought in the District Court of the United States for the Western District of Missouri by petitioners, as trustees of the Chicago, Rock Island & Pacific Railway Company, against respondent, Simonds-Shields-Lonsdale Grain Company, to recover for services of the trustees in installing grain doors in box cars in which grain in bulk was shipped in interstate commerce by respondent (R. 2-25). For convenience, petitioners will be referred to as "plaintiff carrier" and respondent as the "shipper". Judgment was for the shipper in the District Court (R. 81) and on the appeal of plaintiff carrier (R. 31-37), the Circuit Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court by a vote of two members (R. 89-100), with Judge Woodrough dissenting (R. 100). Petition for rehearing was denied August 4, 1938, (R. 105). The case was tried to the court upon formal waiver of a jury (R. 27-8, 38). The facts were largely stipulated, (R. 38-50A), and the District Court found the facts as stipulated, (R. 78).

Grain doors are wooden barriers placed inside of box car doors to prevent bulk grain loaded into the cars from leaking out of the doors, (R. 54-6, 72-4). Plaintiff carrier sued (R. 2-25) for the installation of grain doors at Kansas City, during the period of July 5, 1935 to February 29, 1936, in 624 box cars placed by plaintiff

carrier for loading at the shipper's elevator, loaded with bulk grain by the shipper and transported for it in interstate commerce, (R. 43, 48).

Prior to July 1, 1935, all carriers installed grain doors, at Kansas City and other terminal elevator points, in cars transported by them, without separate charge to the shippers for such installation, and there was no tariff provision for a charge by the carrier for such service (R. 56, 40). Effective July 1, 1935, a new tariff provision was added to the freight tariffs filed with the Interstate Commerce Commission which provided that the installation of grain doors should be a service performed by or at the expense of the shipper. The provision in question, identified as Item 70 of Western Trunk Lines Tariff, No. 330 (R. 39, 50A) reads as follows:

> "The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carrier and to cover a specified period of time: • • • Kansas City—Mo.—Kan." (R. 71)

In proceedings before the Interstate Commerce Commission attacking the provision, the Commission held the provision reasonable except for the amount of the charge, and that sixty cents (60c) per car instead of one dollar ($1.00) per car was and in the future would be a reasonable charge (R. 61, 65). (220 I. C. C. 753). Following the ruling of the Commission, and prior to the trial, plaintiff carrier reduced the amount sued

for from $1.00 per car to 60c per car, and by requested declaration of law at the trial sought judgment for such amount (R. 79). The tariff provision in question remained in effect throughout the period sued for (R. 39, 53, 51).

The shipper by its answer (1) attacked the tariff provision as unreasonable and (2) averred that it was not liable in any event because there had not been "prior arrangements for the service" within the meaning of the tariff provision (R. 26-7).

One day after the tariff provision became effective, on July 2, 1935, defendant shipper and other shippers wrote plaintiff carrier and other carriers that regardless of the tariff provision in question, the shippers expected the carriers "to continue from and after July 1, 1935, as before said date, to furnish and supply them upon orders for cars to load and ship bulk grain, such equipment for such purposes as is suitable safely to carry bulk grain", and that if ordinary box cars were furnished upon such orders, the shippers would "expect them to be fully coopered or prepared" with grain doors; that "regardless of the tariff items" the shippers declined and would decline to pay any charges whatsoever for the installation of grain doors in cars tendered for loading the bulk grain; that if the carriers did not install grain doors in such cars, the shippers would "demand reimbursement in full together with interest for each and every" expenditure for the installation of grain doors by the shipper (R. 40-2).

In reply to the shippers' letter of July 2, 1935, plaintiff carrier and the other carriers protested that

the installation by them of grain doors without the shippers paying the tariff charges would be a violation of law, and stated that unless "unqualified arrangements" were made it would be necessary to provide the cars which did not have grain doors installed. (R. 42-3) By further correspondence the shippers continued to demand that the carriers install grain doors and to declare that the carriers could not charge therefore, and the carriers continued to protest that the tariff required the shippers to pay the carriers for the service of installing grain doors when performed by the carrier at the request of the shipper (R. 42-48). Following the shipper's letter of July 2, 1935, and during the period of July 5, 1935, to February 29, 1936, plaintiff carrier in fact installed grain doors in the cars in question, and made demand upon the shipper for the payment of the charge provided by the tariff (R. 43-4). The shipper loaded and shipped the cars so equipped but refused to pay the charges demanded (R. 43-4, 45-8).

In both the District Court (R. 78-80) and in the Circuit Court of Appeals, (R. 97, 100) plaintiff carrier took the position the shipper was liable both because the shipper's letter of July 2, 1935, constituted "prior arrangements" for a definite period under the tariff, and because if there were not prior arrangements in strict compliance with the tariff, such arrangements were unnecessary or waived and the shipper liable for the charge by reason of the shipper's ordering the installation of the grain doors, the carrier's performing it and the shipper's accepting, loading and shipping of the cars with the installation so performed.

The District Court by memorandum opinion (R. 86-7) and the Circuit Court of Appeals for its majority opinion (R. 89-100) held that the shipper's request that the plaintiff carrier install the doors from and after July 1, 1935 accompanied by the shipper's statement that it would not pay for the service was not a prior arrangement within the meaning of the tariff, and that the making of a prior arrangement was a condition precedent to the accrual of the charge and could not be and was not waived by the shipper.

Differing with the majority opinion of the Circuit Court of Appeals, Judge Woodrough in his dissenting opinion held (R. 100):

> "The 'arrangement' required by the tariff is for the shipper to let the railroad know before shipment which one as between the two of them is to perform the service in question and for how long. Nothing else. These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935'. Their accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they shipped, or demurrage. If the courts require them to pay, discrimination between those who have had the service and have paid for it and those who have had it without paying for it will be avoided. Discrimination is the evil and the courts should help, not hinder, doing away with it."

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in affirming (R. 100) the judgment of the District Court (R. 81) in favor of defendant shipper.

(2) The Circuit Court of Appeals erred in holding that the shipper's letter of July 2, 1935, demanding (R. 41) plaintiff carrier install grain doors from and after July 1, 1935, was not a prior arrangement within the meaning of the tariff and rendering the shipper liable for the tariff charges, although the shipper in the same letter stated that it would not pay the charges.

(3) The Circuit Court of Appeals erred in not holding that the shipper's request (R. 41, 43) for the installation of the grain doors, compliance therewith by the carrier and the shipper's acceptance, loading and shipping of the cars in interstate commerce, (R. 43, 44, 48) rendered the shipper liable for the tariff charges, regardless of whether there was a prior arrangement within the strict terms of the tariff provision.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

POINT A.

The tariff made the installation of grain doors a service to be performed by or at the expense of the shipper in all cases, and by the carrier only as agent for the shipper and for a charge specified by the tariff and not included in the other transportation charges. The performance of the service by the carrier without charge would constitute unlawful discrimination.

Since the carrier could not lawfully agree to perform the service free of charge for the shipper, the same result cannot be accomplished by indirection.

POINT B.

The only prior arrangement required by the tariff was for the shipper to request or demand that the carrier install the grain doors as the agent of the shipper. The shipper's liability for and the amount of the charges was not the subject of the arrangement but was fixed by the tariff and therefor by law. There was a complete "prior arrangement" under the tariff.

POINT C.

The installation of grain doors by the carrier at the request of the shipper and the shipper's acceptance of the installations and loading and shipping of the cars in interstate commerce rendered the shipper liable for the tariff charges under the Interstate Commerce Act requiring uniform payment of all tariff charges and the prohibiting of discrimination, regardless of the manner and form of prior arrangement.

POINT D.

Jurisdictional grounds for review are presented and on the review the decision of the Circuit Court of Appeals should be reversed.

POINT E.

Respondent's position, as indicated by its brief opposing the petition for certiorari, is unsound.

POINT A.

The tariff made the installation of grain doors a service to be performed by or at the expense of the shipper in all cases, and by the carrier only as agent for the shipper and for a charge specified by the tariff and not included in the other transportation charges. The performance of the service by the carrier without charge would constitute unlawful discrimination.

Prior to July 1, 1935, the installation of grain doors at Kansas City and other terminal points had been a service performed by the carriers without separate charge to the shippers and for which the tariff provided no charge (R. 56, 40). The tariff provision in question which went into effect July 1, 1935, still required the carrier to furnish material for grain doors but made the service of installation a shipper's service, that is to say a service to be performed by the shipper itself or through an agent in all cases, and in all cases at the expense of the shipper (R. 39, 50A). Under the tariff the carrier was offered as an agent for the shipper for the purpose of installation of grain doors, and was to receive the payment of the charge therein specified of One Dollar ($1.00) per car. For convenience we repeat the quotation of the specific tariff provision:

"The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time:

* * * Kansas City.....Mo.-Kan." (R. 50A).

The only circumstances under which the tariff permitted the carrier to perform the installation service were as the agent of the shipper and for the tariff compensation. The tariff, when it was on file, and as long as it was not disapproved by the Interstate Commerce Commission, had the effect of a statute. *Pennsylvania R. R. Co.* v. *International Coal Company*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; *Robinson* v. *B. & O. Railroad Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115.

In *Pennsylvania R. R. Company* v. *International Coal Mining Company*, *supra*, 230 U. S. 184, 197, 33 S. Ct. 893, 896, in an opinion by Mr. Justice Lamar, the Court said:

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

Prior to the trial of the case at bar the provision was expressly approved by the Interstate Commerce Commission as reasonable, except as to the amount of the charge, which was reduced from one dollar ($1.00)

per car to sixty cents (60c) per car. (R. 61, 65), 220 I. C. C. 753. Said Interstate Commerce Commission Report was in evidence (R. 51), and the finding and ruling was available to all shippers and carriers regardless of whether they were parties to the particular proceedings. *A. J. Phillips Co.* v. *Grand Trunk Western Railway*, 236 U. S. 662, 665, 35 S. Ct. 444, 445. Plaintiff carrier reduced the amount sued for from one dollar ($1.00) per car to sixty cents (60c) per car and sought judgment for the latter amount. (R. 79).

The Interstate Commerce Commission held "that when, at the request of the shipper, the carrier installs the grain doors it is entitled to a reasonable charge for the service rendered." (R. 61). The decision of the Circuit Court of Appeals is in conflict with this ruling of the Interstate Commerce Commission as well as with the decisions of this Court and the Circuit Court of Appeals relied upon by petitioners.

Since under the tariff (R. 50A) plaintiff carrier could perform the service of installation of grain doors only as the agent of the shipper, and at a specific charge in addition to the other freight charges, to permit the shipper to receive the benefit of the installation by the carrier without requiring the shipper to pay the charge, necessarily would be to permit unlawful discrimination under the Interstate Commerce Act which requires uniform payment of all tariff charges, 49 U. S. C. A. Sections 2, 6 (7), 10 (1) (2) (4), and prohibits preference or discrimination in any form or by any device, 49 U. S. C. A. Section 41 (1) quoted in Appendix Post. *Pittsburgh, etc. R. R. Co.* v. *Fink*, 250 U. S. 577, 581-3, 40 S.

Ct. 27, 28; *N. Y. C. R. Co.* v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510; *Loomis* v. *Lehigh Valley, R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; and *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584, 589-90; 43 S. Ct. 206, 208-9.

In *Pittsburgh, etc. R. R. Co.* v. *Fink, supra*, 250 U. S. 577, 581-3; 40 S. Ct. 27, 28, in an opinion by Mr. Justice Day, the Court said:

> "The purpose of the Act to Regulate Interstate Commerce, frequently declared in the decisions of this court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the act to secure.
>
> • • •
>
> "It was, therefore, unlawful for the carrier upon delivering the merchandise consigned to Fink to depart from the tariff rates filed. The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff. When the carrier turned over the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law. Under such circumstances consistently with the provisions of the Interstate Commerce Act the consignee was only entitled to the merchandise when he paid for the

> transportation thereof the amount specified as required by the statute. * * *. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. * * *.
>
> "* * * Nor can the defendant in error successfully invoke the principle of estoppel against the right to collect the legal rate. Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute. * * *."

In *New York Central R. Co.* v. *York & Whitney Co.*, *supra*, 256 U. S. 406, 407-8, 41 S. Ct. 509, 510, this Court, speaking through Mr. Justice McReynolds, said:

> "The court below held that York & Whitney Company impliedly agreed to pay the rates imposed by law was a question of fact to be determined upon consideration of all the circumstances.
>
> * * *
>
> "We think the doctrine announced in *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink*, 250 U. S. 577, (November 10, 1919), is controlling and that the liability of York & Whitney Company was a question of law. * * *."

If your petitioners in response to the shippers' letter of July 2, 1935 (R. 40-2), had agreed with the shippers to disregard the tariff and perform the service without charge, as demanded by the shippers in said letter, any such agreement would be null and void and the proper charge would nevertheless accrue under the foregoing decisions of this Court. Since the charge could not therefore be escaped directly by contract of the shippers with the railroads, it is submitted the shippers cannot escape the charge indirectly.

The control placed in the shipper to defeat the charge at will, which would result from the decision of the Circuit Court in this case, would establish a precedent for avoiding uniformity in tariff charges, invariably required in the foregoing decisions of this Court. Also see: *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511-12, 51 S. Ct. 505, l. c. 509; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 326, 345, 32 S. Ct. 742, 748; *China Fire Ins. Co.* v. *Davis*, 50 Fed. (2d) 389, 390, 392, (C. C. A. 2); *Western Grain Co.* v. *Railway Co.*, 56 Fed. (2d) 160, 162, (C. C. A. 5); *Davis, Director General of Railroads* v. *Oil Co.*, 285 Fed. 470, 472-3, (C. C. A. 4).

The shipper's letter of July 2, 1935 (R. 40-2), demanding that the carrier install grain doors, in view of the tariff provision providing that the carrier would act as shipper's agent for that purpose, for a tariff charge, made it the duty of the carrier to install the grain doors. *Menasha Paper Co.* v. *Chicago & Northwestern Ry. Co.*, 241 U. S. 55, 59-60, 36 S. Ct. 501, 503-4, holding carrier bound to furnish cars to shipper on shipper's demand. When the carrier performed the service it performed a legal obligation and was in no sense a volunteer. The tariff (R. 50A) put upon the shipper the corresponding obligation to pay for the service so performed.

Doubtless if the carrier had installed the grain doors without any request from the shipper, the snipper would have been privileged to refuse the cars and the carrier would have been and remained a mere volunteer. Since in the case at bar, the shipper demanded that the carrier install the doors (R. '0-1), accepted the cars

after the installation, and loaded and shipped them in interstate commerce (R. 43, 48), the installation of the doors by the carrier can not be regarded other than a service by the carrier as agent of shipper under the tariff and for which the shipper is by law required to pay the tariff charges.

In *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30, in an opinion by Mr. Justice McReynolds, it was held that in the absence of a tariff provision requiring the carrier to absorb the expense of grain door installation, the shipper could not perform the installation and sue in a state court to recover the expense thereof from the carrier. The attempt of the shipper in the case at bar to avoid payment of the installation performed by the carrier at the request of the shipper, (R. 41) under the tariff placing the expense of installation in all cases on the shipper, is an attempt by the shipper to violate the express provisions of the tariff and an even stronger case in favor of the carrier than the Loomis case.

POINT B.

The only prior arrangement required by the tariff was for the shipper to request or demand that the carrier install the grain doors as the agent of the shipper. The shipper's liability for and the amount of the charges was not the subject of the arrangement but was fixed by the tariff and therefor by law. There was a complete "prior arrangement" under the tariff.

Since the tariff (R. 50A) made installation of grain doors a service to be performed by and at the expense of the shipper in all cases and by the carrier only as agent of the shipper and for compensation provided by

the tariff (Point A, *supra*) the only arrangement to be made by the shipper with the carrier, under the tariff, to render the shipper liable for the tariff charges, was a request or demand by the shipper that the carrier act as his agent to install grain doors. The tariff, and therefore the law, fixed the obligation and amount of the charge and neither the obligation nor the amount was a matter for negotiation or arrangement by the shipper.

Pittsburgh, etc. R. R. Co. v. *Fink*, 250 U. S. 577, 581-3, 40 S. Ct. 27, 28; *N. Y. C. R. Co.* v. *York, etc. Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; and *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115.

Manifestly the letter of July 2 (R. 40-2, 43) whereby the shipper demanded that the carrier install the grain doors "from and after July 1, 1935", was a complete prior arrangement within the meaning of the tariff, rendering the shipper liable for the tariff charge for the grain door installations by the plaintiff carrier, following the letter and during the period of July 5, 1935, to February 29, 1936. Any other construction of the tariff or holding as to the sufficiency of the letter permits unlawful discrimination. The whole matter, both in reasoning and in result, was distinctly, ably and tersely stated by Judge Woodrough in his dissenting opinion, (R. 100):

> "The 'arrangement' required by the tariff is for the shipper to let the railroad know before shipment which one as between the two of them is to perform the service in question and for how long.

Nothing else. These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935.' Their accompanying threat not to pay for the service was brutum fulmen—as though they had said they would not pay the freight on the goods they shipped, or demurrage. If the courts require them to pay, discrimination between those who have had the service and have paid for it and those who have had it without paying for it will be avoided. Discrimination is the evil and the courts should help, not hinder, doing away with it.''

POINT C.

The installation of grain doors by the carrier at the request of the shipper and the shipper's acceptance of the installations and loading and shipping of the cars in interstate commerce rendered the shipper liable for the tariff charges under the Interstate Commerce Act requiring uniform payment of all tariff charges and the prohibiting of discrimination, regardless of the manner and form of prior arrangement.

While it is believed that the case is properly disposed of on the ground that there was a complete prior arrangement within the meaning of the tariff, it is further submitted that regardless of that question, the requirement of the Interstate Commerce Act that all shippers alike pay interstate tariff charges on all services of and connected with interstate transportation, and the prohibition against discrimination in any form or any device, rendered the shipper liable as a matter of law for the tariff charges for the installation in question, upon the undisputed facts (R. 43, 41, 48) that the installation was requested by the shipper, was performed by the carrier, was accepted by the shipper, and the cars so equipped loaded and shipped in interstate commerce by the shipper.

The decisions of this court in *Pittsburgh, etc. R. R. Co.* v. *Fink,* 250 U. S. 577, 581-3, 40 S. Ct. 27, 28; *N. Y. C. R. Co.* v. *York, etc. Co.,* 256 U. S. 406, 408, 41 S. Ct. 509, 510, to the effect that a consignee accepting an interstate shipment becomes liable for all of the tariff charges, it is submitted, are authority for the proposition that the shipper is liable regardless of whether there was a prior arrangement within the technical meaning of the tariff.

No language of the tariff in question can be lawfully employed to defeat the collection of these tariff charges. Unlawful discriminations can not be clothed with immunity because the machinery for accomplishing such discriminations is in tariff form. *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 511-12, 51 S. Ct. 505, l. c. 509, where this Court upheld an order of the Interstate Commerce Commission, which forbade the railroads from paying certain warehouses for services rendered by the warehouses in distributing and assembling package carload freight. This Court decided that such services were not transportation services and such payments amounted to rebates and that, in any case, such payments could not be granted to certain warehouses and refused to other warehouses since that would be an unlawful discrimination. This result was reached notwithstanding that there were published tariffs on file making those certain named warehouses part of the station facilities of the carriers.

This Court said, in the opinion written by Mr. Justice Stone, l. c. 511-12:

> "Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, can not clothe it with immunity."

And further, pages 512-13:

> "The evil of discrimination was the principal thing aimed at by the Act. See *Louisville & Nashville R. Co.* v. *United States, supra,* page 749, and its language is certainly broad enough to embrace all discriminations of the sort described which it was within the power of Congress to condemn. Shreeveport Case, 234 U. S. 342, 356. Section 3 makes it unlawful for any rail carrier 'to make or give any undue or unlawful privilege or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever * * *'."

In *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 225 U. S. 326, 345, 32 S. Ct. 742, 748, this Court refused to enjoin an order of the Commission requiring certain railway companies to cease charging lower rates for coal intended for railway consumption than the rates accorded to other shippers of coal. This result was reached notwithstanding the tariffs provided for such differences in rate. The opinion by Mr. Justice McKenna aptly stated the true nature of tariffs as follows, l. c. 345:

> "The Commission has ordered equality and struck down what it deemed to be preferential charges, even though they were made under formal tariffs. If there may be legal or illegal evasion of the order, we may wonder at the controversy. If the difference between the effect of the order and what the companies can do or want to do be, as is contended, a 'question of words'—a 'question of the nomenclature to be used in tariffs'—the order of the Commission may still be valid. Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the Interstate Commerce Act, can look beyond the forms to what caused them and what they are intended to cause and do cause."

POINT D.

Jurisdictional grounds for review are presented, and on the review the judgment and decision of the Circuit Court of Appeals should be reversed.

It is believed that the question of whether the shipper may ask for and accept service by the carrier offered by the tariff, and by refusing to pay therefor escape liability for the charge fixed by the tariff for the service, is an important and precise question of Federal law which has not been but should be settled by this Court. (Petition, Ground 1, page 6.) It is believed that in holding that the shipper can so escape the charge, the Circuit Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Wabash R. R. v. Horn*, 40 Fed. (2d) 905, 906, in which it was held that one who becomes the owner of a car in transit and by letter orders reconsignment of the car by carrier, could not prevent liability for freight charges by stating in the letter that all charges were to follow the car. (Petition, Ground 2, pages 6 and 7.)

It is believed that in holding that the letter demanding that the carrier perform the service (R. 40-2, 43) did not constitute a prior arrangement within the tariff and render the shipper liable, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court (Petition, Ground 3, pages 7 and 8); and in holding that the shipper is not liable for the service ordered, (R. 43) performed and accepted, (R. 43, 48) the Circuit Court of Appeals has decided a Federal question in a way probably

in conflict with applicable decisions of this Court (Petition, Ground 4, page 8), and regardless of whether there was a prior arrangement technically complying with the tariff provisions (Petition, Ground 5, pages 8 and 9).

It is respectfully submitted, upon Points A and B, *supra*, that the Circuit Court of Appeals erred in not holding that there was a prior arrangement for petitioners to act as respondent's agent, within the meaning of the tariff. It is respectfully submitted, upon Points A and C, *supra*, that the Circuit Court of Appeals further erred in not holding that regardless of the form and manner of prior arrangement, acceptance of the service performed by the carrier upon the demand of the shipper rendered the shipper liable for the tariff charges.

It is respectfully submitted that the Circuit Court of Appeals erred in not reversing the judgment of the District Court with directions to render judgment for petitioners for the amount sued for.

POINT E.

Respondent's position, as indicated by its brief opposing the petition for certiorari, is unsound.

"Prior Arrangements" Under the Tariff.

Respondent contends that there was no prior arrangement under the tariff because "respondent refused to make a prior arrangement", and that the trial court found that there was no prior arrangement and the Circuit Court of Appeals agreed with this finding.

The parties stipulated as to what respondent wrote and did (R. 38-50A, Opinion Circuit Court of Appeals,

R. 89-97), and the facts were undisputed. The construction of the tariff and the question of whether respondent made a prior arrangement for petitioners to install grain doors, within the meaning of the tariff, are questions of law. *Great Northern Ry. Co., et al.* v. *Merchants' Elevator Co.*, 259 U. S. 285, 291-2, 42 S. Ct. 477, 479-80. When respondent says that it refused to make a prior arrangement, we assume that respondent undertakes to interpret or construe the letter of July 2, 1935, which it sent to the carriers. (R. 40-2). The effect of that letter is a question of law for the court. This would be true even if respondent in this same letter in which it demanded that the carriers install the grain doors, had expressly stated that it was nevertheless refusing to enter into any prior arrangement under the tariff.

Respondent says there was no prior arrangement because it "insisted (presumably in the letter of July 2, 1935, (R. 40-2)) that it was the duty of the carrier to install grain doors as a part of its transportation service." When the tariff provision in question (R. 39, 50A) was promulgated, effective July 1, 1935, it ceased to be the duty of the carrier to install grain doors as a part of its transportation service (R. 56, 39), and the installation of grain doors became a service to be performed by or at the expense of the shipper in all cases (Point A, pages 12-18, *supra*). Respondent's insistence that it was the duty of the carrier to install the grain doors as a part of its transportation service, was directly contrary to the tariff and therefore to be disregarded (Points A and B, pages 12-20, *supra*). Respondent itself

says that a tariff "* * * has the force of law until changed in the proper manner", and this is of course true. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197, 33 S. Ct. 893, 896; *Robinson* v. *B. & O. R. R.*, 222 U. S. 506, 509, 32 S. Ct. 114, 115; *Great Northern Ry.* v. *Merchants' Elevator Co.*, 259 U. S. 285, 291-2, 42 S. Ct. 477, 479-80.

Respondent's contention that the arrangement did not "cover a specified period of time", is captious. The shipper's demand in their letter of July 2, 1935 (R. 40-2), that the carriers install grain doors "from and after July 1, 1935", manifestly satisfied the tariff requirement of arrangements "to cover a specified period of time" (R. 50A). Judge Woodrough in his dissenting opinion (R. 100) said: "These shippers unequivocally indicated their expectation that the railroad would perform the service and fixed the time 'from and after June 1, 1935.'" (July 1, was of course intended).

The further contention of respondent that it did not ask the carrier to act as its *agent* is also captious. It has been sufficiently pointed out that under the tariff the carrier could not lawfully install the grain doors except as the agent of the shipper and for the separate charge, over and above the transportation charges, fixed by the tariff in question.

Respondent's argument that tariff provisions must be complied with and its insistence that it is so held in *Davis* v. *Henderson*, 266 U. S. 92, are not pertinent to the question of whether, under the stipulated and undisputed facts, there was a prior arrangement, within the meaning of the tariff in question.

Respondent's assertion that "it is fundamental that tariff provisions are to be strictly construed and any ambiguous provisions are to be construed favorably to the shipper", is not supported by the decisions of this court cited by respondent.

On the contrary, this court in construing tariffs, favors neither the shipper nor the carrier. By the decisions of this court, tariffs are to be construed "favorably" to the uniform payment of all tariff charges by all shippers and the uniform service by all carriers to all shippers, and *unfavorably* to preference or discrimination in any form or by any device. (Point A, pages 12-18, *supra*).

There is no occasion to examine decisions of lower courts cited by respondent since a decision to the effect contended for by respondent, would be contrary to the rule of this court.

In *Great Northern Railway* v. *Delmar Co.*, 283 U. S. 686, 690-1, 51 S. Ct. 579, 581, a shipper contended that a tariff rate between two given points was to be applied to the long route as well as the short one. The tariff did not expressly restrict the rate to the shorter route (l. c. 688). Holding that such restriction was to be implied this Court said in an opinion by Mr. Justice Roberts, (l. c. 690):

> "In this situation we think the tariff should be construed as applying only to the shorter route, and not as giving the shipper the option between the two routes at the through rate. This conclusion is in accord with the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law."

Liability of the Shipper Regardless of the Form and Manner of Prior Arrangement.

Respondent says "That it has been repeatedly held that a carrier cannot recover where the tariff has not been strictly complied with, even though the shipper is benefited." There is cited no decision of this court holding that a shipper, who has been benefited by receiving from the carrier a service *for which published tariffs require the shipper to pay the carrier*, can avoid paying the tariff charge. In *Chesapeake & Ohio R. R.* v. *Westinghouse*, 270 U. S. 260, cited by respondent, this court held that the carrier could not recover as for a special service rendered the shipper, because the tariff provided no charge for the service rendered and because in so far as the service was special and beyond that for which the tariff provided a charge, the carrier rendered an unlawful service, constituting a preference to the shipper. The tariff involved in the case at bar provided for installation of grain doors by the carrier, as the agent of the shipper, and imposed tariff charge therefor upon the shipper.

Respondent is not supported by *Davis* v. *Henderson*, 266 U. S. 92. In that case a shipper was denied recovery of damages for delay in delivering cars for loading and shipment of cattle, because his order had been oral and not in compliance with the tariff requirement that cars must be ordered in writing. To have permitted the shipper to recover would have been to have given him a preference or an advantage beyond that offered to shippers generally. Also, recovery was denied to the party who had failed to comply with the tariff, whereas

in the case at bar, the District Court and the Circuit Court of Appeals have held that the shipper could avoid payment of the tariff charges by reason of the shipper's own failure, as those courts have held, to make sufficient prior arrangement which, under the tariff, was necessary to entitle the shipper to the service.

Respondent relies heavily on *Van Dusen Harrington* v. *Northern Pacific Railway Co.*, 32 Fed. (2d) 466, decided by the Circuit Court of Appeals of the Eighth Circuit. If the case supports respondent, it is submitted that it is contrary to the rule of this court. The case, however, does not appear to be in point. The carrier was seeking to recover reconsignment charges for which the tariff provided, in case a given time elapsed before a reconsignment order, after notice by the carrier to the shipper of the location of the cars in which shipments were contained. Notice was, in the opinion of the court, imported to the shipper, as furnishing information, and a carrier's service upon which the charge was based. In the case at bar, the carrier performed the full service of the installation of the grain doors, and the service was accepted by the shipper, but shipper refused to pay for it.

If informality existed in the prior arrangements for the service, which is denied (Point B, pages 18-20, *supra*), it would be immaterial in view of the overriding concern of the Congress and this Court that no shipper receive a tariff service without paying the tariff charge therefor, and that there be no preference or discrimination in any form or in any device as between shippers. (Point A, pages 12-18, *supra*. Point B, pages

18-20, *supra*). In the case of *United States* v. *Miller*, 223 U. S. 599, cited by respondent, this court held, that a shipper was subject to indictment for violation of the law against rebates and discrimination, although the tariff rate in question had not been posted by carrier as required by Section 6 of the Interstate Commerc Act.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, and that this Court should reverse the judgment and decision of the Circuit Court of Appeals for the Eighth Circuit with directions that the Circuit Court of Appeals reverse the judgment of the District Court and direct that court to render judgment for petitioners for the amount sued for, as reduced at the trial to $374.40 by petitioners requested conclusion of law (R. 79) to conform to reduction of the tariff charge to 60 cents per car by the Interstate Commerce Commission (R. 65).

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APPENDIX.

Statutes Involved.

Section 2, 49 U. S. C. A. p. 137 (1920) (Transportation Act of Feb. 28, 1920, c. 91, §404, 41 Stat. 479).

Sec. 2. *Special rates and rebates prohibited.* If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. (Feb. 4, 1887, c. 104, Sec. 2, 24 Stat. 379; Feb. 28, 1920, c. 91, Sec. 404, 41 Stat. 479).

* * * * *

Section 6 (7), 49 U. S. C. A.—p. 283 (1920) (Transportation Act of Feb. 28, 1920, c. 91, §411, 41 Stat. 483.)

Sec. 6, par. (7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such

transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such are are specified in such tariffs.

* * * * *

Section 41 (1), U. S. C. A., p. 308 (1906) (Elkins Act as amended by Hepburn Act of June 29, 1906, c. 3591, §2, 34 Stat. 587).

Section 41. *Liability of corporation carriers and agents; offenses and penalties.* (1) Liability of corporation common carriers; offenses; penalties; jurisdiction. Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under Sections 41, 42, or 43, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by Sections 41, 42, or 43, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby

any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000; Provided, That any person, or any officer or director of any corporation subject to the provisions of Sections 41, 42, or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

Section 10 (1), (2) and (4), 49 U. S. C. A., pp. 354-6 (Transportation Act of February 28, 1920, c. 91, Sec. 414, 41 Stat. 483).

(1) *Violation by carrier or officer; penalty.* Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done,

any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense; *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

(2) *False billing or classification by carrier; penalty.* Any common carrier subject to the provisions of this chapter, or whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

(4) *Inducing unjust discrimination; penalty; liability for damages.* If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

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In the Supreme Court
of the
United States

OCTOBER TERM, 1938.

No. 342

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

PETITIONERS' REPLY BRIEF.

SUPPLEMENTAL STATEMENT.

This reply brief is respectfully submitted by way of answer to the contention of respondent made for the first time in its brief lately filed, that the installation of grain doors was not a transportation service under the Interstate Commerce Act. The trial court and the Circuit Court of Appeals both proceed upon the theory

that it was a transportation service, and the brief of respondent in opposition to the writ, and indeed, the better part of the present brief also so assume.

Respondent argues in its Statement (pp. 3-7) that there was no prior arrangement under the governing tariff. That is a question of law under the Interstate Commerce Act and a principal point in controversy, and has no place in the respondent's statement.

ARGUMENT.

Summary of the Argument.

Point I.

Respondent is in error in contending that the installation of grain doors by the carrier at the shipper's request was not a carrier's service, subject to the Interstate Commerce Act and the governing tariff; but that the carrier and shipper were in such case free to bargain "as ordinary individuals and subject to the usual rules applicable to the making of contracts."

A. For the reason that this service is a transportation service under 49 U. S. C. A., Sec. 1 (3) within the jurisdiction of the Interstate Commerce Commission; and every shipper must be treated alike. Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30.

B. For the reason that the governing tariff gives a shipper an election to perform the installation service himself; or to request the carrier to do it, as respondent has done, and to pay the uniform tariff charge for the service so performed by the carrier, which respondent has not done. Cleveland & St. Louis Ry. v. Dettlebach, 239 U. S. 588, 593-4, 36 S. Ct. 177, 180.

Point II.

Respondent is in error in contending that this tariff provision for prior arrangements must be construed strictly in favor of respondent.

A. For the reason that tariffs are construed in the light of the Interstate Commerce Act, and will be given that interpretation, if possible, which will comply with the Act and not result in a violation thereof. Great

Northern Ry. Co. v. Delmar Co., 283 U. S. 686, 690-1, 51 S. Ct. 579, 581.

B. For the reason that tariffs are not construed strictly or to the letter regardless of effect, but are given a reasonable construction to give effect to their practical purpose. Menasha Paper Co. v. C. & N. W. Ry. Co., 241 U. S. 55, 62-3, 36 S. Ct. 501, 504, 505.

Point I.

Respondent is in error in contending that the installation of grain doors by the carrier at the shipper's request was not a carrier's service, subject to the Interstate Commerce Act and the governing tariff; but that the carrier and shipper were in such case free to bargain "as ordinary individuals and subject to the usual rules applicable to the making of contracts."

A. For the reason that this service is a transportation service under 49 U. S. C. A., Sec. 1 (3) within the jurisdiction of the Interstate Commerce Commission; and every shipper must be treated alike. Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30.

(This contention appears in respondent's brief, pp. 17, 12, 14, 16-20).

The governing tariff was intended to regulate, with that fundamental uniformity required by the Act, the installation of grain doors in cars furnished to transport grain in interstate commerce. Section 1 (3), 49 U. S. C. A. of the Act (Act of February 28, 1920, c. 91, 41 Stat. 474, Sec. 400 (3)) in the definition of "Transportation," plainly gives the Interstate Commerce Commission jurisdiction to regulate this service; for that section reads as follows:

> "The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

This Court, in the case of *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30, expressly holds that the service of installing grain doors by a carrier for a shipper is a transportation service, subject to the administrative jurisdiction of the Interstate Commerce Commission.

The Commission has in the instant case expressly held installing grain doors to be a carrier's service under the tariff when requested by the shipper (R. 52, 60).

B. For the reason that the governing tariff gives a shipper an election to perform the installation service himself; or to request the carrier to do it, as respondent has done, and to pay the uniform tariff charge for the service so performed by the carrier, which respondent has not done. Cleveland & St. Louis Ry. v. Dettlebach, 239 U. S. 588, 593-4, 36 S. Ct. 177, 180.

The purpose of this tariff is manifestly to permit the shipper to install the grain doors at his own expense, as a shipper's service, or to ask the carrier to do it for him for a reasonable charge, as a carrier's service. Not only does the plain language of the tariff bear this out, but the Interstate Commerce Commission has so held in upholding its validity (R. 60, 61, 63). When the carrier is requested to perform the service, the carrier is performing a transportation service, a carrier's serv-

ice for the shipper. The tariff authorizes and requires the carrier to render this service, when a shipper requests it. Therefore, the governing tariff read in the light of the Interstate Commerce Act governs the rights and liabilities of the carrier and shipper.

If respondent is correct in its contention that performing this service for the shipper at a tariff rate is different from hauling the shipper's goods at a tariff rate, then the carrier can bargain with each shipper, free to give rebates and make discriminations, in installing grain doors.

Such is not the law and is inconsistent with respondent's position before the Commission (p. 8 respondent's brief) and in the trial of this case (p. 7 respondent's brief).

This Court, in the case of *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, 593-4, 36 S. Ct. 177, 180, holds that while warehousing is not a carrier service at common law, it has been made so by the Act, to prevent rebates and discriminations between shippers; and that where a shipper requests this warehousing service (instead of taking the goods away and doing his own warehousing), the shipper must pay the tariff charge and abide by a limitation of liability approved by the tariff. This Court, speaking through Mr. Justice Pitney, declared, pp. 593-5:

> "And this is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584, c. 3591), which enlarged the definition of the term 'transportation,' (this, under the original act, included merely 'all instruments of

shipment or carriage') so as to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection with* the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, *storage*, and hauling *of property transported;* and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish *such transportation* upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. All charges made for *any service rendered or to be rendered in the transporation* of passengers or property *as aforesaid, or in connection therewith,* shall be just and reasonable; and every unjust and unreasonable charge *for such service or any part thereof* is prohibited and declared to be unlawful.'

From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like. The recommendation of the Interstate Commerce Commission for the adoption of the uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight. It recognizes—whether correctly or not, is a question not now presented—the right of the carrier to make a charge, the amount of which has not been definitely fixed in advance, for storage as warehouseman in

addition to the charge for transportation; but at the same time it recognizes that a valuation lower than the actual value may be agreed upon between the shipper and the carrier, or determined by the classification or tariffs upon which the rate is based; and it is a necessary corollary that what should be a reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods."

Point II.

Respondent is in error in contending that this tariff provision for prior arrangements must be construed strictly in favor of respondent.

This contention appears in respondent's brief, pp. 12-13, 28-33).

No case respondent cites sustains this proposition; whereas the cases of Great Northern Ry. Co. v. *Delmar Co.*, 283 U. S. 686, 690-1, 51 S. Ct. 579, 581, and *Menasha Paper Co.* v. *C. & N. W. Ry. Co.*, 241 U. S. 55, 62-3; 36 S. Ct. 501, 504, 505, are directly contrary to it.

A. For the reason that tariffs are construed in the light of the Interstate Commerce Act, and will be given that interpretation, if possible, which will comply with the Act and not result in a violation thereof. Great Northern Ry. Co. v. Delmar Co., 283 U. S. 686, 690-1, 51 S. Ct. 579, 581.

If respondent is correct it could enjoy free the service that other shippers (R. 56, 62, 65) have to pay for, although it was respondent's own fault if the arrangements made lacked any desirable perfection. The effect of the decision below in this case here on review, is to place it in the power of respondent to defeat the tariff charge at its pleasure, and to accomplish indirectly what

cannot be accomplished directly, even by agreement. Departure from the published tariffs, which are given the force of Statutes, is *per se* a discrimination in violation of the Act. That is the statutory basis for a suit for undercharges. (Point A, Petitioners' Brief).

If tariffs are to be strictly construed, it is to prevent discrimination in violation of the Act, as for a special service to a shipper not provided for in the tariffs. *Davis* v. *Cornwell,* 264 U. S. 560 (p. 31 respondent's brief). The other cases cited by respondent present situations where a carrier or *shipper is denied recovery,* because of *its own* failure to comply with a tariff. *Davis* v. *Henderson,* 266 U. S. 92 is such a case.

The *Delmar* case is quoted on p. 27 of Petitioners' Brief, to show that this tariff should be construed to avoid such a discriminatory result in violation of the Act.

B. For the reason that tariffs are not construed strictly or to the letter regardless of effect, but are given a reasonable construction to give effect to their practical purpose. Menasha Paper Co. v. C. & N. W. Ry. Co., 241 U. S. 55, 62-3, 36 S. Ct. 501, 504, 505.

This Court held in the *Menasha* case that a failure on the part of the carrier to put all the cars awaiting delivery on consignee's siding that there was physically room for, as *strictly* required by the demurrage tariff (which stated the siding must be "full"), did not prevent the accrual of the demurrage charges. The carrier had in fact complied with the other requirements of the demurrage tariff by giving written notice of the arrival and description of the cars, and had put all the cars on the siding that consignee could actually handle. The

consignee contended the tariff had to be strictly construed to defeat the charge. But this Court declared, speaking through Mr. Justice McKenna, on pages 62, 63:

> "It is somewhat difficult to state succinctly the argument of counsel by which he attempted to give pertinency to the contention based on these rules. We have seen that the sidetrack of the paper company could accommodate about seven cars, but as the company used the track it could handle only two or three cars a day and hence it did not ask for more. The Supreme Court of the State, therefore, decided that the railway company had complied with its obligation to the paper company by complying with such demand and was entitled to charge for demurrage. And answering the contention of the paper company (repeated here), the court said the railway 'was not obliged to do a vain and useless thing by putting seven cars upon the track at one time and thus prevent the practical handling or unloading of any cars thereon by appellant (paper company) contrary to its orders.' The court, by such holding, counsel says, decided that 'the rules must have a reasonable construction.' And, further, 'This is the crux of the decision and it is absolutely in opposition to all of the decisions of the Interstate Commerce Commission and of the courts and of the spirit and intent of the Act to Regulate Commerce.' In other words, counsel insists that there should have been an actual filling of the tracks even though this would have prevented their use and have been contrary to the directions of the company, *the basis of the contention being 'that the rules must be strictly construed and that there must be "definite tariff authority" for the charges made.'* And the conclusion, it is asserted, is supported by all authorities, judicial, administrative and legislative. Rigorously applying the test that the exact letter of the statute must be observed, counsel goes so far as to assert that there was an imperative duty upon the railway company to so fill the tracks, and this without orders. * * *

We are unable to concur in counsel's construction of the rules or to hold that it has any such formidable support as he assigns to it. And we content ourselves with the bare assertion, not even pausing to review counsel's chief reliance, that is, *United States* v. *Denver & Rio Grande R. R.*, 18 I. C. C. 7. The case has not the breadth given to it. If it had we should be unable to follow it."

This case represents the established view of this Court. (Petitioners' Brief, Point B, pp. 19-20 and Point C, pp. 21-22).

Conclusion.

It is respectfully submitted that respondent's contentions in its brief are not the law and cannot defeat the tariff charge for a tariff service rendered at its request; and therefore this Court should reverse the judgment below and direct the recovery of the lawful tariff charges due in the sum of $374.40, by Petitioners from Respondent, in conformity with the order of the Interstate Commerce Commission.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 342.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

M. W. Borders, Jr.,
Dupuy G. Warrick,
Wilfred Wimmell,
Counsel for Respondent.

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VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

STATEMENT.

Petitioners sued Simonds-Shields-Lonsdale Grain Company, a corporation, respondent herein, to recover $624.00 claimed to be due for services rendered in installing grain doors on 624 cars furnished respondent, under a newly created tariff providing charges of $1.00

per car for services which in the past had been performed by railroad carriers without charge. The tariff included the following provision:

> "The railroad will act as shipper's agent and install grain doors at terminal elevator points specified by law, for a charge of $1.00 per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time."

Three requirements are stipulated in the foregoing tariff: (1) a "prior arrangement"; (2) for a "period of time"; (3) which period of time was to be "specified."

The petitioners requested that respondent make a prior arrangement pursuant with such tariff (Rec. 62, 63). The respondent and other shippers wrote the carriers a letter in which they positively and unequivocally refused to enter into any arrangements with the carriers. This letter, dated July 2, 1935, reads as follows (Rec. 60, 61):

> "The undersigned, being shippers of bulk grain located in Kansas City, Mo.-Kans., hereby notify you, and each of you, that regardless of anything contained in items Nos. 70 and 75 appearing on page 13 of a certain tariff filed for your account by L. E. Kipp, Agent with the Interstate Commerce Commission under No. I. C. C. A-2579, or any other rule or regulation filed with the Interstate Commerce Commission or otherwise, they expect you to continue from and after July 1, 1935, as before said date, to furnish and supply them upon orders for cars to load and ship bulk grain such equipment for said purpose as is suitable safely to carry bulk grain.
>
> "Said undersigned parties further notify you that if ordinary box cars are furnished and sup-

plied upon such orders they will expect them to be fully coopered or prepared with necessary side-door barricades completely installed and ready for loading.

"Said undersigned parties further notify you that regardless of the tariff items, or any other rules or regulations, they decline and will decline to pay any charges whatsoever which may be demanded by you for any work or service involved in making your cars suitable for loading bulk grain, and in particular they decline and will decline to pay any charge for the alleged service of installing or placing grain doors or barricades in cars tendered by you upon order for loading bulk grain.

"Said undersigned parties further notify you that if upon orders as aforesaid cars are furnished and supplied which are not fully coopered with grain doors or barricades in place or which are not otherwise suitable and properly prepared for loading bulk grain such cars will be accepted under protest, and protest is hereby made against each and every such car furnished or which may be furnished upon such orders.

"And said undersigned parties further notify you that if cars are furnished and supplied, contrary to this notice, which necessitate expenditure by said parties, or any of them, for labor or materials in order to install grain doors or barricades, or otherwise to make such cars suitable and properly prepared for loading bulk grain, then in that and every such event said parties will demand reimbursement in full together with interest for each and every such expenditure.

"Said parties hereby request you to acknowledge receipt hereof upon the attached copy by return mail."

In answer to the shippers' letter of July 2, the carriers wrote a letter, dated July 15, 1935, requesting the respondent shipper and other elevator companies to make

"unqualified arrangements pursuant to the terms of the tariff" (Rec. 62, 63).

On November 22, 1935, the respondent shipper wrote the carriers stating that no arrangement with any carrier had been made, and refused to make any arrangements. Payment of bills submitted was refused (Rec. 64). In this letter it was stated (Rec. 64):

> "This tariff became effective on July 1st and we know of no change in the practice of furnishing and installing grain doors from that existing prior to July 1st, the carriers continuing to furnish upon orders for cars to transport bulk grain, cars completely equipped with grain doors and ready for use. We have made no arrangement with any carrier under which such carrier was to install the doors as our agent as contemplated by the tariff above referred to.
>
> "For this reason will you please advise tariff authority for these charges and if the bills were issued under authority of Item 70 W.T.L. Tariff 330 will you please advise how you arrived at the conclusion this item justifies the charge in the absence of any arrangement as contemplated by paragraph (1)?"

To this letter the carriers responded on January 9, 1936, with the astonishing proposition that they had accepted the letter of July 2, 1935, as a "prior arrangement" (Rec. 65).

In reply to this letter, the respondent shipper on January 15, 1936, again denied that it had "made any arrangement with any carrier" (Rec. 66).

The carriers replied to the above letter on March 30, 1936, and in this letter insisted that the tariff regulations

be complied with and asked for the making of definite arrangements and for the period of time such arrangements should be in force. The letter stated (Rec. 68, 69):

> "In order that the tariff regulations may be strictly complied with, you will advise whether you elect to have carriers furnish cars with grain doors or lumber installed, or whether you elect to install grain doors or lumber for your own account.
>
> "In the event you wish carrier to perform the installation service the period of time this arrangement shall be in force shall be specified.
>
> "If you decline to enter into an arrangement, as provided by the tariff, or if you elect to install the grain doors or lumber for your own account, the carrier will furnish cars inspected and O. K.'d for grain loading, but without grain doors or lumber installed."

The respondent shipper made no answer to this last letter (Rec. 92).

During all this correspondence and after it was completed the petitioners and other carriers continued to furnish cars fully coopered with grain doors. It is for coopering these cars during all this time and afterwards that petitioners sued to recover charges of $1.00 per car (Rec. 6-45).

While the carriers, including petitioners, threatened refusal of installation of the grain doors, nevertheless they made the installations, billing the defendant and other shippers at the rate of $1.00 per car. These bills were persistently and immediately returned to the carriers, including petitioners, with the statement that the shippers were not liable for such amounts (Rec. 63, 64).

Upon institution of suit, the trial court and the circuit court of appeals held that there could be no recovery by petitioners, because no prior arrangements were made as required by the tariff and that such provision of the tariff could not be waived.

ARGUMENT.

Petitioners argue four points in support of their petition for writ of certiorari. Their Point B will be answered in the following discussion under Point I. Petitioners' Points A and C are practically the same, and will be answered under Point II. Point D is answered in Point III.

I.

The requirement of the tariff of a prior arrangement for a specified period of time was an integral essential part of the tariff which was not complied with and could not be waived.

The evidence showed that the respondent refused to make a prior arrangement, but insisted that it was the duty of the carrier to install grain doors as a part of its transportation service. It conclusively appeared that there was (1) no "prior arrangement" (2) for any "period of time" (3) "specified" or agreed to in any manner. The trial court found that there was no prior arrangement and the circuit court of appeals agreed with this finding.

Petitioners contend that the only arrangement required by the tariff was a request or demand by the shipper that the carrier act as *his agent* to install grain doors. If so, there was no request that the carrier act as the shipper's agent. Moreover, the tariff required a prior arrangement "to cover a specified period of time." The record shows that these requirements of the tariff were not complied with (Rec. 59-70).

The contention of petitioners that the facts were sufficient to justify a recovery of the charges stated in the tariff is in direct conflict with those decisions holding that provisions like those included in this tariff are an integral part of the tariff which cannot be waived. *Davis* v. *Henderson*, 266 U. S. 92, 69 L. Ed. 182; *Louisville & N. R. Co.* v. *Chatters*, 279 U. S. 320, 73 L. Ed. 711; *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848; *VanDusen Harrington Co.* v. *Northern Pacific Railway Co.*, 32 F. (2d) 466, 60 F. (2d) 394; *American Railway Express Co.* v. *American Trust Co.*, 47 F. (2d) 16, cert. den. 284 U. S. 629.

In *Davis* v. *Henderson*, 266 U. S. 92, 69 L. Ed. 189, the tariff provided that orders for cars for use by shippers of cattle should be in writing. No written notice was given but the station agent had been notified orally. It was contended that since the carrier had notice, it was unnecessary that the notice be in writing. The Supreme Court held that the provision of the tariff requiring that the notice be in writing was an essential part of the tariff which could not be waived. It was said (266 U. S. l. c. 93):

> "The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff. *Georgia, F. & A. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197, 60 L. Ed. 948, 36 Sup. Ct. 541; *Missouri, K. & T. R. Co.* v. *Ward*, 244 U. S. 383, 61 L. Ed. 1213; *Davis* v. *Cornwell*, 264 U. S. 560, 60 L. Ed. 848, 44 Sup. Ct. 410."

Following the Henderson case, the courts have repeatedly held that such provisions as that in the tariff

in question requiring a prior arrangement for a specified period of time cannot be waived, but that such requirements must be strictly complied with. In *VanDusen Harrington Company* v. *Northern Pacific Railway Company, supra*, a tariff required that the railroad give the consignee notice of the location of tracks where cars of grain were being held. By custom this practice was not followed. Subsequently, the carrier sued for charges and the shipper defended that the notice required by the tariff had not been given. The carrier contended that the provision had been waived. The Circuit Court of Appeals of the 8th Circuit, relying upon *Davis* v. *Henderson, supra*, held it could not be waived and said (32 F. (2d) l. c. 470):

> "It is probably true that upon inquiry at the yard office, the consignees could ascertain the location of the hold tracks in North Minneapolis with greater or less delay, but it cannot be denied that the terms of the tariff, which would appear to be conditions precedent to the right to impose these reconsignment charges, were not observed. Such tariffs are construed strictly. The carrier was not compelled to publish its tariff in these precise terms; having done so it must abide by them."

Since the decision of the Supreme Court in *Davis* v. *Henderson, supra*, the Interstate Commerce Commission has repeatedly held that railroad tariffs requiring notices in writing must be strictly complied with and if the notice is not given in writing, a recovery of charges cannot be had *Milne Lumber Co.* v. *Michigan Central R. Co.*, 118 I. C. C. 580; *Republic Coal Co.* v. *Chicago, St. Paul Railway Co.*, 85 I. C. C. 331; *National Fire Proofing Co.* v.

Bellefonte Central R. Co., 102 I. C. C. 345; *Central West Coal & Lumber Co.* v. *Chicago, B. & Q. R. Co.*, 104 I. C. C. 452; *Louisell Pine & Hardwood Co.* v. *Chicago, R. I. & P. Railway*, 132 I. C. C. 341; *Consolidated Lumber Co.* v. *Lehigh Valley R. Co.*, 139 I. C. C. 278. In the Milne Lumber Company case the tariff provided that when carload freight was refused, "notice of such refusal shall be sent by wire to consignor." Such notice was not given, although other notice was given to the consignor. The commission held this insufficient as a basis for demurrage charges and said (l. c. 581):

> "As the shipment was unclaimed, it became the duty of the Grand Trunk on July 12 to send the consignor notice by wire to that effect, as provided by Rule 4, Section E. Such notice was not sent. It is immaterial whether complainant received notice otherwise that the shipment was unclaimed, for the tariff requirement that consignor be advised by wire could not be waived, such notice being a prerequisite to the accrual of demurrage after the expiration of the five days mentioned in Rule 4, Section E-1. *Davis* v. *Henderson*, 266 U. S. 92; *Campbell Construction Co.* v. *L. C. & S. E. Railway Co.*, 95 I. C. C. 603."

Moreover, since the decision in *Davis* v. *Henderson*, *supra*, the commission has held that where the right to freight charges is conditioned upon an agreement between the carrier and shipper, such agreement in the form required by the tariff must be shown. *Milne Lumber Co.* v. *New York Central R. Co.*, 167 I. C. C. 743; *American Lumber & Export Company* v. *Central of Georgia Railway Co.*, 91 I. C. C. 65.

Numerous decisions of this court and the lower federal courts hold that all the provisions of a carrier's tariff must be strictly complied with: cannot be waived and that such tariffs have the effect of a statute. *Penn. R. Co. v. International Coal Mining Co.*, 230 U. S. 184. 57 L. Ed. 1446; *Armour Packing Co. v. United States*, 209 U. S. 56. 52 L. Ed. 681; *Davis v. Cornwell*, 264 U. S. 560. 68 L. Ed. 848; *Georgia F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190. 60 L. Ed. 948. It is fundamental that tariff provisions are to be strictly construed and any ambiguous provisions are to be construed favorably to the shipper. *Southern Pacific Co. v. Lothrop*, 15 F. (2d) 486; *Atlantic Bridge Co. v. Atlantic Coast Line R. R. Co.*, 36 F. (2d) 163; *Union Wire Rope Corporation v. A., T. & S. F. Ry.*, 66 F. (2d) 965; *Updike Grain Co. v. C. & N. W. Ry.*, 33 F. (2d) 486; *K. C. Southern Ry. v. Albers Com. Co.*, 223 U. S. 573; *Gulf, O. & S. Ry. v. Hefley*, 158 U. S. 98; *K. C. Southern Ry. Co. v. Carl*, 227 U. S. 639.

II.

The fact that the respondent shipper received the coopering service without paying the tariff charge is no reason for disregarding the positive provisions of the tariff requiring a prior arrangement for a specified time.

Up to the time the carriers established the tariff in question they had always installed grain doors in Kansas City at their expense (Rec. 102). The essence of petitioners' appeal to this court is that to deny petitioners the recovery sought would be to permit unlawful discrimination. Under Point A it is urged that the performance of the service by the carrier without charge would

constitute unlawful discrimination and on page 18 of petitioners' brief it is stated:

> "Since under the tariff plaintiff carrier could perform the service of installation of grain doors only as the agent of the shipper, and at a specific charge in addition to the other freight charges, to permit the shipper to receive the benefit of the installation by the carrier without requiring the shipper to pay the charge, necessarily would be to permit unlawful discrimination under the Interstate Commerce Act which requires uniform payment of all tariff charges, 49 U. S. C. A., Sections 2, 6 (7), 10 (1) (2) (4) and prohibits preference or discrimination in any form or by any device, 49 U. S. C. A., Section 41 (1) quoted in Appendix, post."

Point C (p. 22) presents the same argument. Petitioners cite a great number of cases, but all of these are decisions where the courts upheld all the requirements of tariffs in order to prevent discrimination. Contrary to these cases, petitioners seek to disregard essential provisions of the tariff in order to charge a shipper amounts stipulated as charges in the tariff. The cases relied upon by petitioners show that unlawful discrimination lies in a departure from tariffs rather than an adherence thereto. Petitioners seek to justify a failure to comply with a tariff by cases holding that such tariffs must be complied with.

The conclusive answer to petitioners' argument is that it has been repeatedly held that a carrier cannot recover where the tariff has not been strictly complied with, even though the shipper is benefited. In other words, it cannot be urged as a basis for ignoring tariff requirements that if it is not done benefits will accrue in

favor of a shipper. *Chesapeake & Ohio R. Co.* v. *Westinghouse Church Kerr & Co.*, 270 U. S. 260, 70 L. Ed. 576; *VanDusen Harrington* v. *Northern Pacific Railway Co.*, 32 F. (2d) 466; *American Railway Express Co.* v. *American Trust Co.*, 47 F. (2d) 16, cert. den. 284 U. S. 629.

In *Chesapeake & Ohio Railway Co.* v. *Westinghouse Church Kerr & Co.*, *supra*, a carrier performed services for which it was not entitled to recover under the provisions of the applicable tariff. The carrier claimed that the shipper had secured the benefit of transportation service for which it should be compelled to pay, otherwise it would be receiving discriminations which should not be permitted. This court held that nevertheless a recovery could not be had which was not permitted and authorized by an applicable tariff.

In the *VanDusen Case*, *supra*, the railroad failed to comply with the requirement of a tariff that notice should be given as to the location of certain cars. It was held that having failed to live up to the letter of the tariff, it could not recover reconsignment charges, even though the shipper was benefited by the haul.

Following the decision of this court in *Davis* v. *Henderson*, *supra*, the Interstate Commerce Commission has repeatedly held that in order to be entitled to recover its charges, tariff provisions must be strictly complied with and the fact that a shipper is benefited will not justify recovery where a required agreement or notice has not been had in the manner required by the tariff. *American Lumber & Export Co.* v. *Central of Georgia Railway Co.*, 91 I. C. C. 65; *Milne Lumber Co.* v. *Michigan*

Central R. Co., 118 I. C. C. 580; *Republic Coal Co.* v. *Chicago St. Paul Railway Co.*, 85 I. C. C. 331; *National Fire Proofing Co.* v. *Bellefonte Central R. Co.*, 102 I. C. C. 345; *Central West Coal & Lumber Co.* v. *Chicago, B. & Q. R. Co.*, 104 I. C. C. 452; *Louisell Pine & Hardwood Co.* v. *Chicago, R. I. & P. Railway*, 132 I. C. C. 341; *Consolidated Lumber Co.* v. *Lehigh Valley R. Co.*, 139 I. C. C. 278.

Any tariff, although it is discriminatory or contains technical requirements which make it difficult for the carrier to show performance, is nevertheless effective and has the force of law until changed in the proper manner. *United States* v. *Miller*, 223 U. S. 599, 56 L. Ed. 568; *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. Ed. 943.

So long as a tariff remains operative, all its provisions are binding upon shipper and carrier alike; the shipper cannot recover charges paid on the ground that they were unreasonable or discriminatory, nor can the carrier, without strict compliance with the tariff, recover its charges on the ground that failure to permit recovery would result in a rebate or discrimination. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553; *Texas & P. R. Co.* v. *Cisco Oil Mill*, 204 U. S. 449, 51 L. Ed. 562; *Southern R. Co.* v. *Tift*, 206 U. S. 428, 51 L. Ed. 1124; *Robinson* v. *B. & O. R. Co.*, 224 U. S. 506, 56 L. Ed. 288; *Penn. R. Co* v. *International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446; *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. Ed. 943; *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 67 L. Ed. 183.

III.

No jurisdictional grounds for review are presented by the petition.

The petition does not present any question of unsettled general law. This case involves simply the construction of a tariff and the trial and circuit courts applied rules settled and established by decisions of this court. The decision of this court in *Davis* v. *Henderson*, 266 U. S. 92, 69 L. Ed. 182, not only supports the opinion of the circuit court, but necessitates the conclusions reached by both the trial court and the court of appeals. Since that decision it is settled that all the provisions in a tariff must be strictly complied with and that such provisions cannot be waived. Moreover, the courts have repeatedly held that ambiguous tariffs must be construed favorably to shippers. No new proposition or point of law is involved in the opinion of the court of appeals.

The decision of the court of appeals is not in conflict with decisions of other circuit courts or with decisions of this court. In claiming a conflict among the circuit courts petitioners rely on *Wabash R. R.* v. *Horn*, 40 F. (2d) 905 (C. C. A. 7). In this case it was held that one who became the owner of a car of goods in transit was liable for freight charges, although he directs that the charges follow the car. The reason for this holding was because the bill of lading so provided and the court simply held that in view of that circumstance such person was liable. This case merely requires an adherence to the tariff which is exactly what the trial and circuit courts held in the instant case.

Similarly, the other cases relied upon by petitioners are cases where the courts required strict adherence to tariff provisions and refused to permit waivers, agreements or discriminations conflicting with such tariffs to destroy their force and effect. None of these cases support the point urged by petitioners that the tariff in the instant case should not be strictly construed in order to permit petitioners to have a recovery in the face of explicit provisions in the tariff which have not been complied with.

Many of the cases cited by petitioners support the rule that where erroneous charges have been collected, the carriers are nevertheless entitled to recover the full charges allowed by the tariff despite agreements, representations and estoppels to the contrary. These are cases where the tariffs are strictly complied with and the courts simply hold that such tariffs must be adhered to. None of these decisions support the points upon which petitioners pray that this court grant a writ of certiorari.

Conclusion.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted.

M. W. Borders, Jr.,
Dupuy G. Warrick,
Wilfred Wimmell,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 342.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF.

M. W. Borders, Jr.,
Dupuy G. Warrick,
Wilfred Wimmell,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 342.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

STATEMENT OF FACTS.

Respondent believes that petitioners' statement of the case omits essential facts and that a further statement will be helpful to the court.

NATURE OF CASE.

Petitioners sued Simonds-Shields-Lonsdale Grain Company, a corporation, respondent herein, to recover $624.00 claimed to be due for services rendered in installing grain doors on 624 cars furnished respondent under a newly created tariff providing charges of $1.00 per car for services which in the past had been performed by the

railroad carriers without charge. The tariff included the following provision (R. 50A):

> "The railroad will act as shipper's agent and install grain doors at terminal elevator points specified by law, for a charge of $1.00 per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time."

Respondent denied liability and claimed that it was not liable because it had not made a "prior arrangement" and for other reasons which will be mentioned hereafter.

Practice prior to the establishment of tariff.

Prior to the establishment on July 1, 1935, of the tariff in question, it had long been the practice of the railroads, including petitioners, to furnish grain doors at terminal points and to prepare cars for bulk grain loading by installation of such grain doors without cost to the shippers. From 1906 to 1909, the carriers at such terminal points either installed the doors themselves or employed agents to install them or employed the elevator companies, making them an allowance therefor. In 1909 a tariff was filed covering the installation of grain doors at Kansas City and providing for an allowance to elevator companies where the work was done by them. This tariff was cancelled in 1911. Thereafter and until July 1, 1935, when the carriers filed the tariff involved in this suit the carriers had always furnished the doors and installed them at their own expense (R. 56, 76, 77).

Establishment of tariff and refusal of the shippers to make a "prior arrangement."

The tariff in question, item No. 70 of W. T. L. Tariff 330, was filed and published by the carriers to become effective July 1, 1935. That part of this tariff applicable to this case is as follows (R. 50A):

> "Grain doors or lumber for necessary side door barricades (also for necessary end-door barricades, if

car is equipped with end doors requiring such protection) for carload shipments in bulk of grain, grain products, seeds and other articles taking same rates, as specified in lists Nos. 1, 2, 3, 4, 5, 6, items Nos. 200 to 270, inclusive, will be furnished at loading stations without charge, by the initial road-haul carrier (see Note 1). The grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense. The railroad will act as shipper's agent and install grain doors at terminal elevator points specified below, at a charge of $1.00 per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time."

From the time this tariff was filed, respondent and other shippers refused to authorize the railroads to install the doors as the shippers' agents. They positively and unequivocally refused to make a prior arrangement as provided in the tariff and claimed that it was the obligation of the railroads to furnish cars suitable to transport grain safely and that cars furnished without grain doors installed were unsuitable; that the carriers were compensated for such service by the line-haul rate and that it would be improper to shift this obligation or expense to the shippers (R. 26, 27, 56).

Upon receipt of the proposed tariff the shippers, including respondent, on July 2, 1935, wrote the carriers a letter in which they positively and emphatically refused to enter into any arrangements or to authorize the carriers to act as their agents in the installation of such grain doors. This letter, set out in full in the record, beginning on page 40, after stating that the shippers expected the carriers to continue to furnish cars equipped with grain doors after July 1, 1935, as they had prior to that date, stated (R. 41):

"Said undersigned parties further notify you that if ordinary box cars are furnished and supplied upon such orders they will expect them to be fully coopered or prepared with necessary side-door barricades completely installed and ready for loading.

> "Said undersigned parties further notify you that regardless of the tariff items or any other rules or regulations, they decline and will decline to pay any charges whatsoever which may be demanded by you for any work or service involved in making your cars suitable for loading bulk grain, and in particular they decline and will decline to pay any charge for the alleged service of installing or placing grain doors or barricades in cars tendered by you upon order for loading bulk grain."

The carriers recognized that the shippers by their letter of July 2, had refused to make a prior arrangement and on July 15, 1935, they wrote respondent and other shippers requesting a compliance with the provisions of the tariff and warning the shippers that unless the prior arrangements were made as provided in the tariff it would be necessary to provide cars without grain doors installed. Said letter stated in part (R. 43):

> "*Unless therefore you make unqualified arrangements* pursuant to the terms of the tariff it will be necessary to provide cars which *do not have the grain doors installed* although, of course, the carrier will provide grain doors or lumber as contemplated by the tariff" (italics ours).

Although the carriers in said letter of July 15, recognized the necessity of making a prior arrangement and requested that this be done, they continued after July 1, 1935, to furnish cars with grain doors properly installed although no such arrangement was made. In fact they so continued from July 1, 1935, to February 29, 1936 (R. 43). Each month during said period the railroads rendered the shippers bills for cars furnished covering the charges of $1.00 per car (R. 43). On November 22, 1935, respondent returned to petitioners all bills theretofore rendered, with a letter declining to pay said bills, said letter being as follows (R. 44):

"November 22, 1935.

"Mr. H. W. Myers, Manager, Kansas City R. R. Clearing House Ass'n, Kansas City, Mo.

"Dear Mr. Myers:

"We are returning you herewith bills for $1.00 per car charge for alleged service of installing grain doors in cars furnished at the Rock Island and Milwaukee Elevators loaded with bulk grain for transportation over the various lines issuing these bills.

"There is no tariff authority for this charge unless it be Item No. 70 of W.T.L. Tariff 330, which item however provides in paragraph (1) that the railroad will act as the shipper's agent and install grain doors at terminal elevator points at a charge of $1.00 per car if prior arrangements for the service are made with the carriers covering specified period of time.

"This tariff became effective on July 1st and we know of no change in the practice of furnishing and installing grain doors from that existing prior to July 1st, the carriers continuing to furnish upon orders for cars to transport bulk grain, cars completely equipped with grain doors and ready for use. We have made no arrangement with any carrier under which such carrier was to install the doors as our agent as contemplated by the tariff above referred to.

"For this reason will you please advise tariff authority for these charges and if the bills were issued under authority of Item 70 W.T.L. Tariff 330 will you please advise how you arrived at the conclusion this item justifies the charge in the absence of any arrangement as contemplated by paragraph (1)?

"Yours very truly, Simonds-Shields-Lonsdale Grain Co., by A. B. Frederickson."

To this letter the carriers responded on January 9, 1936, with the astonishing proposition that they had accepted the letter of July 2, 1935, as a "prior arrangement" although the carrier's letter of July 15, 1935, showed this to be untrue (R. 44, 45).

On January 15, 1936, respondent again denied that it had "made any arrangement with any carrier." This letter is as follows (R. 45, 46):

"January 15, 1936

"Mr. H. W. Myers, Manager, Kansas City Railroad Clearing House Association, Kansas City, Missouri.

"Dear Sir:

"Replying to your letter of January 9th, file 7968 and returning various bills for charges covering alleged service of installing grain doors in cars loaded with grain at the Milwaukee and Rock Island Elevators.

"We have noted all you have said and cannot agree with you that Mr. Scott's letter of July 2nd, under our signature could be construed as making a prior arrangement with the carriers for this service.

"As we stated in our letter of November 22nd, we have not made any arrangement with any carrier to perform this service in accord with the provisions of Item 70 W.T.L. tariff 330, which states this arrangement is to be made with the carriers and to cover a specified period of time.

"For this reason we decline to pay the bills and return them with this letter.

"Yours very truly, Simonds-Shields-Lonsdale Grain Co., A. B. Frederickson."

After the receipt of this letter the carriers continued to furnish cars with grain doors properly installed (R. 43).

The carriers replied to the above letter on March 30, 1936, and again insisted that the tariff regulations be complied with and asked for the making of definite arrangements and for the fixing of a period of time during which such arrangements should be in force. The letter stated in part (R. 47, 48):

"In order that the tariff regulations may be strictly complied with, you will advise whether you elect to have carriers furnish cars with grain doors or lumber installed, or whether you elect to install grain doors or lumber for your own account.

"In the event you wish carrier to perform the installation service the period of time this arrangement shall be in force shall be specified.

"If you decline to enter into an arrangement, as provided by the tariff, or if you elect to install the grain doors or lumber for your own account, the carrier will furnish cars inspected and O. K.'d for grain loading, but without grain doors or lumber installed."

The respondent and other shippers made no answer to this last letter (R. 71). It will be noted that the carriers, as late as March 30, 1936, were even then insisting that the tariff provisions be strictly complied with and were asking for the making of definite arrangements and for the period of time such arrangements should be in force.

Filing of this suit.

This suit was begun by petition filed on April 4, 1936 (R. 2). The petition set forth the provisions of the tariff in question and prayed a recovery in the sum of $1.00 per car for 624 cars furnished with grain doors installed between July 1, 1935, and February 29, 1936 (R. 4-25).

On April 13, 1937, after various intermediate proceedings, respondent filed its answer denying liability and alleging that it was the duty of petitioners to furnish cars properly equipped with grain doors installed without charge to respondent; that the petitioners had furnished such cars so equipped and ready for loading for a period of many years and that they were compensated therefor by the line-haul rate; that the furnishing of the services and facilities covered by the tariff in question was a part of the transportation service which petitioners were under a duty to furnish to the respondent and for which they were compensated by their line-haul rate and that the purported tariff was unreasonable and that no prior arrangement was ever made (R. 26, 27).

Proceedings before Interstate Commerce Commission.

While the suit filed by petitioners was pending in Kansas City, the validity and reasonableness of this tariff was presented to the Interstate Commerce Commission. The case was submitted to the commission on January 14, 1937 (R. 51). In that proceeding it was the contention of the shippers that it was the duty of the carriers, as part of their transportation service, to furnish cars with grain doors installed, and that cars furnished without such doors installed were unsuitable and did not satisfy the carrier's obligations (R. 56). They also contended that should it be found by the commission that it was reasonable and proper for the carriers to make a charge for installing grain doors, then the tariff in question was nevertheless improper because the charge of $1.00 per car was unreasonable (R. 63). On April 12, 1937, the majority of the Interstate Commerce Commission decided that it was not unreasonable to require that the shippers at their expense install the doors furnished by the carriers as such installation was "an incident of loading bulk grain" (R. 61). But the commission sustained the contention of the shippers and held that the charge of $1.00 per car was unreasonable and that a charge of 60 cents per car would be proper. Its finding in this respect is as follows (R. 65):

> "6. We find that in those instances where the railroad acts or has acted as shipper's agent in installing grain doors at the terminal elevator points specified in the schedules here under consideration the charge of $1 per car was, is, and for the future will be, unreasonable to the extent that it has exceeded or may exceed 60 cents per car. An order for the future will be entered."

In the opinion of the majority of the commission it was held that the clause relative to prior arrangements was incorporated for the carriers' benefit and could be waived by them "in those instances in which the

carriers acted as shippers' agent" (R. 63). Three of the commissioners dissented and held that (R. 69):

> "The finding that the requirement may be waived at the discretion of defendants because the rule is in their own interest is directly contrary to the ruling of the Supreme Court in *Davis* v. *Henderson*, 266 U. S. 92, wherein the court held that a tariff rule providing that orders for cars must be in writing could not be waived by a railroad."

The commission did not approve the tariff in question, but found it to be unreasonable and ordered that the railroads cease and desist from publishing or collecting a charge in excess of 60 cents per car. It further ordered that the railroads on or before July 20, 1937, establish a new tariff in the manner prescribed by Section 6 of the Interstate Commerce Act for a charge not to exceed 60 cents per car. The order is as follows (R. 69-70):

> "It is ordered, That the above-named defendants, according as they perform the services at the respectively designated points, be, and they are hereby, notified and required to cease and desist, on or before July 20, 1937, and thereafter to abstain, from publishing, demanding, or collecting, for the installation by them of grain doors in railroad cars placed for loading with grain, grain products, or seed, in bulk, at the terminal elevator points designated in the aforesaid report, a charge which shall exceed the charge named in the next succeeding paragraph hereof.
>
> "It is further ordered, That said defendants, according as they perform the services at the respectively designated points, be, and they are hereby, notified and required to establish, on or before July 20, 1937, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, for the installation by them of grain doors in railroad cars placed for loading with grain, grain products, or seed, in bulk, at the aforesaid terminal

elevator points, a charge which shall not exceed 60 cents per car.

"And it is further ordered, That this order shall continue in force and effect until the further order of the Commission.

"By the Commission."

Opinions of the district and circuit courts.

Although the Interstate Commerce Commission, on April 12, 1937, had disapproved and found the tariff made the basis of petitioners' suit against respondent to be unreasonable, and had directed the establishment of a new tariff in the manner prescribed by the Interstate Commerce Act, petitioners continued the prosecution of their suit against respondent and the case was tried and submitted to the court on May 6, 1937, approximately a month after the decision of the Interstate Commerce Commission (R. 27). Petitioners did not amend their petition, but the cause was tried on the petition as originally filed. The prayer of the petition was not reduced, although, after the case was tried and submitted, petitioners in their requested conclusions of law asked that the court render judgment for $374.40 (R. 79).

The trial court, in a memorandum opinion filed May 19, 1937, held that the provisions of the tariff had not been complied with and that no recovery could be had. The court said (R. 86):

> "Not only, however, were 'no prior arrangements for the service' of installing the grain doors in question entered into by the plaintiffs and defendant, but the defendant positively and unequivocally refused to enter into such 'arrangements.' Since, on the face of the tariff, 'prior arrangements' were prerequisite to the effectiveness of the tariff it would seem clear that plaintiffs cannot prevail in this case unless the party or parties for whose benefit the condition precedent of the tariff was written could and did waive it."

The court then held that following the decision in *Davis* v. *Henderson*, 266 U. S. 92, such provisions of the tariff could not be waived and pointed out that the commission had found the charge of $1.00 to be unreasonably high and that it could not be said that it was not for the benefit of the shipper "that he shall have the right of election between himself installing a grain door (a 60 cent job) and paying another $1.00 for doing that job."

The majority of the court of appeals approved the holding of the trial court and held that under the authority of *Davis* v. *Henderson*, 266 U. S. 92, the provisions of the tariff had not been complied with, could not be waived and petitioners could not recover.

SUMMARY OF POINTS.

I.

The installation of grain doors was not a transportation service but was an incident of loading and a part of the shipper's duties. By the tariff in question the railroads offered to install the doors as the "shipper's agent" for a consideration, if the shippers made "prior arrangements for the service." The usual rules must be applied to such tariff to determine whether the shippers authorized the railroads to act as their agent and whether there was a "prior arrangement."

II.

The facts conclusively show that respondent and other shippers did not make a "prior arrangement," but unequivocally refused to authorize the railroads to act as their agents in making the installations. While the respondent and other shippers insisted that the railroads should install the grain doors at their expense, this did not constitute a "prior arrangement" and was insufficient to make the shippers liable for the tariff charges.

III.

Even if this tariff covered a carrier's service and not a shipper's service, the requirement of the tariff of a prior arrangement for a specified period of time was an integral essential part of the tariff which was not complied with and could not be waived. Moreover, the evidence shows that neither the railroads nor the shippers intended to waive the provisions of the tariff or did anything that would constitute a waiver.

IV.

The fact that the respondent received the coopering service without paying the tariff charge did not constitute unlawful discrimination and is no reason for dis-

regarding the positive provisions of the tariff requiring a prior arrangement for a specified time and requiring that the railroads be authorized as "shipper's agent." Strict adherence to tariff provisions does not constitute unlawful discrimination even though the shipper may receive a benefit. Moreover there is no evidence in this record to show that discrimination would exist if respondent does not pay for coopering these cars.

V.

Petitioners cannot recover because this suit is based upon a tariff which the Interstate Commerce Commission has held to be unreasonable and unlawful.

VI.

No jurisdictional grounds for review are presented. The lower courts adhered to settled rules of tariff construction in construing this tariff. They required a strict adherence to the requirements of the tariff and in so holding followed decisions of this court.

ARGUMENT.

Petitioners have overlooked and ignored essential facts.

Before discussing the points relied upon by respondent, it will be well to call this court's attention to the following essential and important facts wholly overlooked in petitioners' argument. Respondent believes that a proper consideration of these facts completely destroys petitioners' contentions.

1. The Interstate Commerce Commission found that the installation of grain doors was not a transportation service, but was an incident of loading, a shipper's service. Accordingly, by the tariff in question, the carriers simply offered, upon prior arrangement being made with the shippers, to perform a shipper's service for a consideration. In so doing the railroads were dealing with a service that was not a transportation service and their negotiations were subject to the usual rules applicable to contracts.

2. While the petitioners acknowledge in their brief that the tariff gave the carriers a right to be paid only where they were authorized to and acted as the *shipper's agents* they completely ignore the facts that conclusively show that no agency relationship was created. The respondent and other shippers positively and unequivocally refused to make any arrangement whereby the railroads would be authorized to install the doors as the shipper's agents (R. 40-49). They always insisted that it was the carrier's obligation to make such installations and further that the charge of $1.00 per car was an unreasonable one (R. 26, 27, 63).

3. Petitioners wholly ignore the fact that the shippers had good reason to refuse to make an arrangement or agreement whereby the railroads should install the

doors at $1.00 per car, because they contended that such charge was unreasonable and their position was directly sustained by the Interstate Commerce Commission (R. 65).

4. Petitioners have sued under a tariff to recover charges which the Interstate Commerce Commission found to be unreasonable. In so holding, the Interstate Commerce Commission directly upheld the contention of the shippers.

5. Petitioners seek a recovery under the provisions of a tariff which by reason of the opinion of the Interstate Commerce Commission never had any validity for the Interstate Commerce Commission, after finding the tariff in question to be unreasonable, ordered that the railroads file a new proper tariff establishing a charge not to exceed 60 cents per car.

6. Petitioners have treated the tariff in question as having the effect of law, claiming that charges under such tariff must be collected else there will be unlawful discrimination, completely overlooking and ignoring the fact that this was a carrier-made tariff; not a commission-made one, and that this court has held that carrier-made tariffs are always subject to being unlawful if found by the Interstate Commerce Commission to be unreasonable. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 348.

7. The parties could not waive the requirements of the tariff in question nor did they attempt to do so. Both the railroads and the shippers recognized that in order for the railroads to act as "shipper's agent" the tariff requirement, of a prior arrangement, had to be complied with.

I.

The installation of grain doors was not a transportation service but was an incident of loading and a part of the shipper's obligation which the carriers offered to perform as shipper's agent upon the making of a prior arrangement. Whether a prior arrangement was made is determined by application of the usual rules governing the making of contracts.

When the carriers filed this tariff it was upon the theory that it was the obligation of the shippers to make installation of grain doors and that this was not a transportation service. Item No. 70 of tariff 330 provided that the carriers would furnish the doors but that "the grain doors or lumber so furnished shall be installed by the shipper (or his agent) and at his expense" (R. 50a). The railroads by other provisions in such tariff offered to "act as shipper's agent" and install such grain doors at a charge of $1.00 per car if "prior arrangements for the service" were made with the carriers for a "specified period of time."

When the tariff was filed the shippers contended that it was improper because the installation of such grain doors was the obligation of the carriers. Consequently they were unwilling to authorize the railroads to act as their agents in the installation of these doors (R. 40-49). The Interstate Commerce Commission by its decision supported the position taken by the carriers and held that the installation of such grain doors "is an incident of loading," and that the shippers should install such doors at their expense (R. 61). Since the decision of the commission conclusively established that this was an incident of loading and therefore something to be performed by the shippers, it is perfectly apparent that the carriers had neither a duty nor a right to make the installations with expectation of pay therefor unless the necessary "prior arrangement" was made constituting them the "shipper's agent."

Petitioners' brief ignores these facts and throughout their brief it is assumed that this was a tariff covering transportation services required of the carriers. Their argument that none can avoid the provisions of tariffs and the charges collectable thereunder, and that it would be unlawful discrimination to deny a recovery in this case ignores the facts. They treat this case as though the tariff covered a transportation service required of carriers. The cases relied upon are not in point for the reason that where a service is one which a carrier is not bound to perform, but one which is to be done by the shipper then, as to any arrangement whereby the carrier undertakes to perform such service the parties deal with each other as ordinary individuals and subject to the usual rules applicable to the making of contracts and the creation of the relationship of principal and agent.

In Elliott, Railroads, Vol. 4, p. 463, it is said:

> "While a railway company cannot by contract or otherwise change the nature of its public duties or obligations it may, where it is not under a duty or obligation to the public, contract to perform service in the character of a private carrier of goods or passengers. In other words, where there is a right to refuse to perform the services requested there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier."

And in 10 C. J. 190, it is said:

> "Where the goods offered for shipment are such as the carrier is not bound to accept for transportation, it may, if it chooses to carry them, impose such limitations on its common-law liability as common carrier as it sees fit. In other words, it enjoys the same freedom of the right of contract as other corporations or persons and may name the conditions under which it will undertake the transportation. This is not violative of public policy."

The foregoing rules and their applicability to a case like this are firmly established. *Santa Fe, P. & P. R. Co.* v. *Grant Bros. Construction Co.*, 228 U. S. 177, 57 L. Ed. 787; *N. Y. C. R. R.* v. *Lockwood*, 21 L. Ed. 627, 177 Wall. (U. S.) 357; *Black & White Taxi Cab & Transfer Co.* v. *Brown & Yellow Taxi Cab & Transfer Co.*, 276 U. S. 518, 72 L. Ed. 681, 48 S. Ct. 404; *Cleveland C. C. & St. L. Ry. Co.* v. *N. Y. C. & St. L. Ry. Co.*, 11 F. (2d) 850; *Oklahoma Belt R. Co.* v. *Schaff*, 282 Fed. 128; *Thompson* v. *C., B. & Q. R. Co.*, 157 I. C. C. 775.

In the *Lockwood Case, supra*, this court said (17 Wall. (U. S.) l. c. 377):

> "A common carrier may, undoubtedly, become a private carrier or a bailee for hire, when as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry."

And in the *Grant Bros. Construction Co. Case, supra*, this court held a contract to be valid which exempted a carrier from liability for loss or damage to the property of a construction company. It was contended that the contract was invalid because the rates provided were lower than those appearing in published schedules of the carrier. But this court held otherwise and said (228 U. S. l. c. 188):

> "It is clear that in dealing with transportation of this character over its own road in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith, and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions."

The other cases cited support the same rule and directly sustain respondent's contention that, where a railroad acts with reference to services not required of it as part of its transportation service, it contracts as does any ordinary person and is subject to the usual rules. The decision of the Interstate Commerce Commission in *Thompson* v. *C., B. & Q. R. Co.*, 157 I. C. C. 775, shows the application of these rules. There a carrier, by reason of an agreement with a shipper, furnished and fed feed to livestock. In holding that this was not a transportation service, the commission said (l. c. 777):

> "It does not follow that any and all services performed by common carrier, engaged in interstate commerce in connection with property transported, are subject to the provisions of the act. Many services are performed by a carrier as incidents to transportation and in its capacity as a bailee for hire, 10 C. J., p. 80; 2 Hutchison on Carriers (3rd Ed.), Sec. 640. A reasonable construction of the term 'transportation' as defined in Section 1 of the Interstate Commerce Act limits it to such services as a carrier is required by law to provide upon reasonable request."

The commission, in concluding its opinion, said (l. c. 778):

> "It is our view that the feeding of complainant's livestock at Montgomery was not a service of transportation within the meaning of the act, which defendants can be required to provide upon reasonable request. The fact that the charges assailed are published in a tariff on file with this commission cannot confer jurisdiction upon us where it has not been granted by Act of Congress."

Since by reason of the decision of the Interstate Commerce Commission the installation of grain doors was not such a service as a carrier could be required to provide upon reasonable request, the authorities cited by petitioners are not applicable to this case and the first question for this court to determine is whether or not under the facts disclosed by this record respondent constituted

petitioners its agents to install the grain doors and whether or not it made any arrangement or agreement authorizing the carriers to act for respondent for a consideration to be paid by respondent as provided in the tariff. These questions must be determined by the application of the usual rules governing the creation of agencies and the making of contracts.

II.

No prior arrangement was entered into between the petitioners and the respondent shipper and no agency was created.

It needs little consideration of the facts in this case to show that the respondent did not constitute petitioners its agent to install the grain doors. By its tariff the railroad offered to act as "shipper's agent" if "prior arrangements for the service" were made for "a specified period of time." From the time this tariff was filed, respondent and the other shippers refused to authorize the railroads to install the doors as the shipper's agents. They positively and unequivocally refused to make a "prior arrangement." Their reason for doing so was apparent to the railroads, and it was no secret that all the shippers were claiming that it was the obligation of the railroads to continue to furnish cars properly equipped with grain doors as they had prior to the time when this tariff was established (R. 26, 27, 56). When the proposed tariff was received by the shippers they wrote the carriers on July 2, 1935, emphatically refusing to enter into any arrangements whereby the carriers would be authorized to install the doors as agents for the shippers. They insisted that the installation be made by the carriers under the same arrangements as had existed theretofore (R. 41). The carriers understood that the shipper's letter of July 2 constituted a refusal to make a prior arrangement and on July 15, 1935, they wrote respondent and other shippers requesting a compliance with the pro-

visions of the tariff and warning the shippers that unless a prior arrangement was made it would be necessary to provide cars without grain doors installed. Said letter stated (R. 43):

> "Unless, therefore, you make unqualified arrangements pursuant to the terms of the tariff it will be necessary to provide cars which do not have the grain doors installed, although, of course, the carrier will provide grain doors or lumber as contemplated by the tariff."

While the carriers in this letter recognized the necessity of making a prior arrangement before they would have any authority to install the doors and be paid therefor, they continued after July 1, 1935, and continuously until after February 29, 1936, to make the installations, although no such arrangement was ever made. Each month during said period the railroads rendered the shippers bills for cars furnished covering the charges of $1.00 per car. On November 22, 1935, respondent returned to petitioners all bills theretofore rendered with a letter declining to pay said bills and stating (R. 44):

> "We have made no arrangement with any carrier under which such carrier was to install the doors as our agent as contemplated by the tariff above referred to."

It was not until January 9, 1936, that the carriers made the astonishing and unfounded assertion that they had accepted the letter of July 2, 1935, as constituting a "prior arrangement." The carrier's letter of July 15, 1935, showed this could not be true (R. 44, 45). On January 15, 1936, respondent again denied that it had "made any arrangement with any carrier" (R. 45, 46). After receiving this letter, and on March 30, 1936, the carriers again insisted that the tariff regulations be complied with and asked that definite arrangements for a fixed period of time be made (R. 47, 48). It is thus seen that the carriers, as late as March 30, 1936, after all the cars involved in this

suit had been furnished, were even then insisting that the shippers make the necessary prior arrangements.

Under these facts it is not surprising that the trial court found that (R. 86):

> "Not only, however, were 'no prior arrangements for the service' of installing the grain doors in question entered into by the plaintiffs and defendant, but the defendant positively and unequivocally refused to enter into such 'arrangement.' "

Under the decisions applicable to facts like those in this case, it is firmly established that no arrangement or agreement was consummated which would give the railroads any legal claim whatsoever. *La Compania Bilbiana de Navegacion De Bilbao* v. *The Spanish-American Light & Power Co.*, 36 L. Ed. 1054, 146 U. S. 483; *McWilliams Bros.* v. *Davis*, 285 Fed. 312; *McCaffrey's Sons* v. *Director General of Railroads*, 282 Fed. 730; *Drake* v. *Mo. State Life Ins. Co.*, 21 F. (2d) 41.

In the La Compania case a ship broker acting on behalf of the owner, but without authority, included in the charter-party an agreement that the owners would install at their expense water ballast tanks for carrying oil in bulk. When the owner was notified of the provision he refused to ratify the action of the broker. Discussion ensued wherein the hirers of the ship demanded that the owners fit the tanks. The owners expressed a willingness to do so, but refused to pay the expense. The hirer renewed its demand for the tanks and demanded that they be installed at the expense of the owners. They refused to pay the hire on the ship until this was done. Thereupon the owners again refused to pay the expense, but expressed a willingness to fit the tanks at the expense of the hirer. Finally the owners, after notifying the hirer, Spanish Light & Power Company, that it would be held for the expense, to avoid further delay, proceeded to fit the tanks to the ship. The fitting was completed and the

Spanish Company was notified that the bills for the expense would be submitted to it. As in the case at bar, it refused to pay these bills. Under these facts this court held that there was no contract, arrangement or agreement, by which the Spanish Light & Power Company could be held liable for the expense; that there could be no recovery either on contract or for the value of the services on implied contract. The court said (146 U. S. l. c. 496):

> "It is quite clear that the libelant could not, in any event, recover from the respondent any part of the expense of fitting up the tanks in the vessel to carry petroleum in bulk. There was nothing in the acts of the parties to throw on the respondent any obligation to fit up the tanks or to pay the expense thereof, if the work should be done. The respondent never promised to make or to pay for any such alteration. On the contrary, it always refused to recognize any such liability on its part, and insisted it was the duty exclusively of the libelant to pay therefor. If the libelant chose to fit up the tanks, that was a voluntary act on its part in regard to work upon its own property, for which it has no remedy against the respondent.
>
> "It is contended, however, that, as the respondent refused to retain or use the vessel unless the tanks were fitted up by the libelant, as provided in the charter party, an implied contract arose; and that, as the libelant did such fitting up, the respondent must bear the expense. But it is found, in effect, that the respondent always and constantly refused to assume the expense, and insisted, as the ground for the making of the alterations, that under the charter-party it was the duty of the libelant to make them. No duress by the respondent is alleged in the libel, or shown."

In the *McWilliams Case, supra*, the owners of tugs gave notice to the hirers, McWilliams Bros. Co., that they would not be responsible for damages to a tow. The McWilliams Co. made the following answer:

"New York, September 6, 1918.

"Mr. D. C. Chase, Sup't Steam Towing, Pennsylvania R. R., Cortlandt Street, N. Y.—Dear Sir: We beg to acknowledge the receipt of your letter of the 2d inst. in reference to the nonresponsibility of your tugs for damage in towing boats by your company, even through negligence. We will not accept your terms as stated in your letter, but we reserve the right to continue to report our boats for towing to your company under the same conditions that have previously prevailed in reference to the responsibility for damage, and if you accept the orders to tow our boats, you do so on the same terms and conditions that have heretofore prevailed.

"Yours very truly,

McWilliams Bros., Inc.

DE.TH By D. Eberle."

Under these facts the court followed the La Compania case and held that there was no meeting of the minds sufficient to constitute an agreement and that the carrier could not under the circumstances avoid the responsibility of his own negligence.

Nor are there any facts upon which the railroads would be entitled to recover the reasonable value of their services for having installed the grain doors. The facts in this case prevent the implication of any contract as the basis of a claim to recover reasonable charges. It is well established that a contract cannot be implied contrary to the intention of the parties or where it is against the express declarations of the party to be charged. 5 C. J. 1385; 71 C. J. 48; *Municipal Water Works Co.* v. *City of Ft. Smith*, 216 Fed. 431; *Landon* v. *Kansas City Gas Co.*, 300 Fed. 351.

The reasoning in *Southern Express Co.* v. *Faut*, 78 S. E. 197, 12 Ga. App. 447, is applicable here. In that case the Faut Fish Co. of Savannah, Georgia, wrote the Southern Express Company as follows:

"We desire to put you on notice that we do not want any more of the fish coming to us

from Florida points reiced while in transit. If any are delayed it is not our fault, and your company will have to use their judgment in disposing of them. We should have no cause to pay reicing charges on fish that come to us by express from Florida when they make the schedule time."

Thereafter the Faut Fish Co. ordered fish from Oak Hill, Florida, consigned to itself. They did not come through in schedule time and were reiced during shipment. The Fish Co. declined to pay icing charges. The carrier contended that it had filed a tariff for such icing charges and that it was entitled to recover them; that to forbid recovery would amount to discrimination. It was held that the carrier was not entitled to icing charges because it was not authorized to furnish these services at the Faut company's expense and upon doing so was merely a volunteer. The court distinguished the case from those cases where a carrier furnishes proper transportation services under tariffs filed and approved by the Interstate Commerce Commission. The court said (78 S. E. l. c. 198):

"* * * The case is one for the application of the elementary principle that no one is required to pay for something which he does not want, and which he has protested against having supplied to him. No one is required to be benefited if he does not wish to be, and certainly no one is required to accept and pay for something which another assumes will be beneficial to him when he does not entertain the opinion that it will be beneficial. A cannot perform a service for B over B's protest, and then compel B to pay for it. * * * The plaintiff in error further insists that not only is the tariff allowed by the Interstate Commerce Commission and the charge for icing in the nature of a regulation which is reasonable and therefore can be imposed by the shipper, but that to permit one shipper to direct that his fish be shipped without icing from a particular section in avoidance of its general rule would tend to throw its business as a carrier into hopeless confusion and to involve it in interminable difficulties. * * * The In-

terstate Commerce Commission, under the provisions of the Interstate Commerce Act (Act Feb. 4, 1887 as amended June 18, 1910, fixes the rate at which services of various kinds shall be performed by carriers of various kinds. But the exercise of this power to promulgate tariffs for services actually performed in transportation does not deprive the passenger, nor the owner of goods delivered for transportation, of the right to contract for such services, as either, as the case may be, may deem necessary for the safe transportation of his property, or of his person, or compel him to pay for services which he may not think necessary; and it may in fact be unnecessary to his own comfort or safety, if a passenger, or to the safety and dispatch of his goods, if he be the owner. The Interstate Commerce Commission has full authority to promulgate rates and rules regulating and fixing the charges of sleeping car companies, and where one becomes a passenger upon a sleeping car, he subjects himself to the regulations and the sleeping car company must collect, and the passenger must pay the fixed rates—no more and no less. The same is true as to the rates and regulations applicable to the passenger upon a railroad company's train, but it does not follow that it is within the power of the railroad company to compel a passenger to occupy a sleeping car, and to pay the rate which the commission allows to be charged for the sleeping service, when the passenger does not wish to avail himself of it. Likewise a carrier might be authorized by the approval of the Interstate Commerce Commission to fix and charge a rate for icing, but it would not be a matter wholly within the discretion of the carrier as to whether a shipment should be iced. If this were true, the carrier might elect to ice shipments which would be damaged, rather than benefited, by the operation. The owner has the right to direct the manner and the route in which his goods shall be shipped, and as ruled above, in the absence of anything appearing to the contrary, the carrier may assume that the consignee is the owner of the goods delivered to it by the consignor for shipment to the consignee without reservation."

Respondent submits that the reasoning of the court n the foregoing case is perfectly sound and directly applicable to the case at bar. It was for respondent to say whether or not the petitioners should install the grain doors as respondent's agents. It refused to acknowledge such agency and repeatedly declined to make the prior arrangement contemplated and provided by the tariff. The carriers had no right to install the car doors with expectation of payment therefor unless they were authorized to do so as the shippers' agents. The mere fact that the shippers insisted that it was the duty of the railroads to furnish and install grain doors at their expense, did not mean that they could do this work and expect the shippers to pay therefor. It was not their obligation to install such doors and had they refused to do so it would have been up to the shippers to fit and install the doors as best they could.

Respondent and the other shippers had good reason to refuse to permit the carriers to make the installation upon the terms stated in the tariff. The carriers were demanding $1.00 per car and the shippers and respondent always claimed that this was an unreasonable charge (R. 63). The shippers were also claiming that it was the obligation of the carriers to make the installation without charge. The carriers did not have to accept this view of the matter. They could have refused to install the grain doors because the tariff provided, "The grain doors, or lumber so furnished, shall be installed by the shipper (or his agent) and at his expense." Instead, they proceeded to furnish the cars with doors properly installed but without the required agreement from the shippers. The opinion of the trial court covering this situation is well stated (R. 87).

> "The $1.00 charge is unreasonably high; the Interstate Commerce Commission so ruled in the case cited. The plaintiffs now admit that in no event should they have judgment at a higher rate than sixty cents per car. Plaintiffs concede that the real value of the services rendered is not more than sixty cents.

How can it be said that it is not, in part at least, for the benefit of the shipper that he shall have the right of election between himself installing a grain door (a sixty cent job) and paying another $1.00 for doing that job. Again, how can it be said that a choice as to whether 'the railroad will act as shipper's agent' *vel non* is of interest only to the railroad and of no interest whatever to the shipper?"

III.

The requirement of the tariff of a prior arrangement for a specified period of time was an integral, essential part of the tariff which was not complied with and could not be waived.

The tariff required several things, all of which were lacking in this case. It required (1), a prior arrangement; (2), to cover "a specified period of time," (3), whereby the railroads were authorized to act as "shipper's agent." The facts indisputably show that there was no agency, no prior arrangement and no specified time agreed to. Such was the finding of the trial court and the circuit court of appeals agreed with this finding.

Petitioners contend under Point B (Petitioners' Brief p. 18) that the only prior arrangement required by the tariff was for the shipper to request or demand that the carrier install the grain doors *"as the agent of the shipper."* But in this case the facts show that there was no agency. There is not the silghtest basis for claiming that there is anything in the record to show that the carriers were authorized to act as agents of the shippers. But petitioners claim that this contention is captious (Petioners' Brief p. 26) because "under the tariff the carrier could not lawfully install the grain doors except as agent of the shipper." This is quite true, but it does not follow that the fact of installation proves the existence of the agency as petitioners assume. Facts sufficient to show the agency contemplated by the tariff are wholly lacking. Petitioners contend that the requirement of the tariff of

a prior arrangement must be deemed to have been complied with or waived else there would be unlawful discrimination. This argument ignores the fact that there can be no unlawful discrimination if the tariffs are complied with.

Ignoring the points heretofore made in this argument and assuming that the provisions of the tariff in question must be applied and construed as are tariffs covering services required of carriers, then the contention of petitioners that the facts were sufficient to justify a recovery of the charges stated in the tariff is in direct conflict with those decisions holding that provisions like those included in this tariff are an integral part of the tariff which cannot be waived.

Davis v. *Henderson*, 266 U. S. 92, 69 L. Ed. 182; *Louisville & N. R. Co.* v. *Chatters*, 279 U. S. 320, 73 L. Ed. 711; *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848; *VanDusen Harrington Co.* v. *Northern Pacific Railway Co.*, 32 F. (2d) 466, 60 F. (2d) 394; *American Railway Express Co.* v. *American Trust Co.*, 47 F. (2d) 16, cert. den. 284 U. S. 629.

In *Davis* v. *Henderson*, 266 U. S. 92, 69 L. Ed. 189, the tariff provided that orders for cars for use by shippers of cattle should be in writing. No written notice was given but the station agent had been notified orally. It was contended that since the carrier had notice, it was unnecessary that the notice be in writing. The Supreme Court held that the provision of the tariff requiring that the notice be in writing was an essential part of the tariff which could not be waived. It was said (266 U. S. l. c. 93):

> "The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff. *Georgia, F. & A. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197, 60 L. Ed. 948, 36 S. Ct. 541; *Missouri, K. & T. R. Co.* v. *Ward*, 244 U. S. 383, 61 L. Ed. 1213;

Davis v. *Cornwell*, 264 U. S. 560, 60 L. Ed. 848, 44 S. Ct. 410."

Following the Henderson case, the courts have repeatedly held that such provisions as that in the tariff in question requiring a prior arrangement for a specified period of time cannot be waived, but that such requirements must be strictly complied with. In *VanDusen Harrington Company* v. *Northern Pacific Railway Company*, *supra*, a tariff required that the railroad give the consignee notice of the location of tracks where cars of grain were being held. By custom this practice was not followed. Subsequently, the carrier sued for charges and the shipper defended that the notice required by the tariff had not been given. The carrier contended that the provision had been waived. The Circuit Court of Appeals of the 8th Circuit, relying upon *Davis* v. *Henderson*, *supra*, held it could not be waived and said (32 F. (2d) l. c. 470):

> "It is probably true that upon inquiry at the yard office, the consignees could ascertain the location of the hold tracks in North Minneapolis with greater or less delay, but it cannot be denied that the terms of the tariff, which would appear to be conditions precedent to the right to impose these reconsignment charges, were not observed. Such tariffs are construed strictly. The carrier was not compelled to publish its tariff in these precise terms; having done so it must abide by them."

This rule was more fully discussed in the same case in 60 F. (2d) 394, where the court said, l. c. 397:

> "We think there is no merit in the contention that the VanDusen Harrington Company was estopped from asserting that Rule 1 was not complied with by the railway company. Neither by waiver nor by estoppel can the duly published tariff rules and charges of a common carrier be modified or abrogated. *Davis* v. *Henderson*, 266 U. S. 92, 45 S. Ct. 24, 69 L. Ed. 182; *Davis* v. *Cornwell*, 264 U. S. 560, 44 S. Ct. 410, 68 L. Ed. 848; *Missouri, Kans. & Tex. Co.* v.

Ward, 244 U. S. 383, 37 S. Ct. 617, 61 L. Ed. 1213; *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948; *American Ry. Express Co.* v. *American Trust Co.*, (C. C. A.) 47 F. (2d) 16.

> "In *Davis* v. *Henderson, supra*, there was involved the rule requiring that orders for cars given to the carrier's local agent must be in writing. Plaintiff, a shipper, contended that the rule had been waived. The Supreme Court said: 'There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff.'"

And in closing its opinion, the court stated, l. c. 398:

> "We are not clearly conv nced that the decision on the former appeal was erroneous and unsound, but on the contrary think it was correct; the parties were simply held to the plain unequivocal provisions of the tariff."

It will be noted that the circuit court of appeals in the foregoing case relied upon the decision of the Supreme Court in the Henderson case. In addition it relied on *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848. Here the Supreme Court held that tariff provisions must be strictly adhered to and consequently a contract by a railroad company to provide a shipper with cars on a day certain was invalid.

Since the decision of this court in *Davis* v. *Henderson, supra*, the Interstate Commerce Commission has repeatedly held that railroad tariffs requiring notices in writing must be strictly complied with and if the notice is not given in writing, a recovery of charges cannot be had. *Milne Lumber Co.* v. *Michigan Central R. Co.*, 118 I. C. C. 580; *Republic Coal Co.* v. *Chicago, St. Paul Railway Co.*, 85 I. C. C. 331; *National Fire Proofing Co.* v. *Bellefonte*

Central R. Co., 102 I. C. C. 345; *Central West Coal & Lumber Co.* v. *Chicago, B. & Q. R. Co.*, 104 I. C. C. 452; *Louisell Pine & Hardwood Co.* v. *Chicago, R. I. & P. Railway*, 132 I. C. C. 341; *Consolidated Lumber Co.* v. *Lehigh Valley R. Co.*, 139 I. C. C. 278. In the Milne Lumber Company case the tariff provided that when carload freight was refused, "notice of such refusal shall be sent by wire to consignor." Such notice was not given, although other notice was given to the consignor. The commission held this insufficient as a basis for demurrage charges and said (l. c. 581):

> "As the shipment was unclaimed, it became the duty of the Grand Trunk on July 12, to send the consignor notice by wire to that effect, as provided by Rule 4, Section E. Such notice was not sent. It is immaterial whether complainant received notice otherwise that the shipment was unclaimed, for the tariff requirement that consignor be advised by wire could not be waived, such notice being a prerequisite to the accrual of demurrage after the expiration of the five days mentioned in Rule 4, Section E-1. *Davis* v. *Henderson*, 266 U. S. 92; *Campbell Construction Co.* v. *L. C. & S. E. Railway Co.*, 95 I. C. C. 603."

Moreover, since the decision in *Davis* v. *Henderson*, *supra*, the commission has held that where the right to freight charges is conditioned upon an agreement between the carrier and shipper, such agreement in the form required by the tariff must be shown. *Milne Lumber Co.* v. *New York Central R. Co.*, 167 I. C. C. 743; *American Lumber & Export Company* v. *Central of Georgia Railway Co.*, 91 I. C. C. 65.

In *United States* v. *Durkee Famous Foods, Inc.*, 17 Fed. S. 846, the court followed *Davis* v. *Henderson*, and held that where a tariff provided that orders for tank barges be in writing such requirement were conditions precedent to the right to collect the tariff charges.

Numerous decisions of this court and the lower federal courts hold that all the provisions of a carrier's tariff

must be strictly complied with; cannot be waived and that such tariffs have the effect of a statute. *Penn. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 52 L. Ed. 681; *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848; *Georgia F. & A. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948. It is fundamental that tariff provisions are to be strictly construed and any ambiguous provisions are to be construed favorably to the shipper. *Southern Pacific Co.* v. *Lothrop*, 15 F. (2d) 486; *Atlantic Bridge Co.* v. *Atlantic Coast Line R. R. Co.*, 36 F. (2d) 163; *Union Wire Rope Corporation* v. *A., T. & S. F. Ry.*, 66 F. (2d) 965; *Updike Grain Co.* v. *C. & N. W. Ry.*, 33 F. (2d) 486; *K. C. Southern Ry.* v. *Albers Com. Co.*, 223 U. S. 575; *Gulf, O. & S. Ry.* v. *Hefley*, 158 U. S. 98; *K. C. Southern Ry. Co.* v. *Carl*, 227 U. S. 639.

Moreover as pointed out by the circuit court of appeals (R. 99), the evidence shows that neither the railroad company nor the shipper ever attempted to waive the requirements of the tariff.

IV.

The fact that the respondent shipper received the coopering service without paying the tariff charge did not constitute unlawful discrimination and is no reason for disregarding the positive provisions of the tariff requiring a prior arrangement for a specified time.

Up to the time the carriers established the tariff in question they had always installed grain doors in Kansas City at their expense (R. 76-77). The essence of petitioners' appeal to this court is that to deny petitioners the recovery sought would be to permit unlawful discrimination. Under Point A it is urged that the performance of the service by the carrier without charge would constitute unlawful discrimination and on page 14 of petitioners' brief it is stated:

> "Since under the tariff (R. 50A) plaintiff carrier could perform the service of installation of grain

> doors only as the agent of the shipper, and at a specific charge in addition to the other freight charges, to permit the shipper to receive the benefit of the installation by the carrier without requiring the shipper to pay the charge, necessarily would be to permit unlawful discrimination under the Interstate Commerce Act which requires uniform payment of all tariff charges, 49 U. S. C. A., Sections 2, 6 (7), 10 (1) (2) (4) and prohibits preference or discrimination in any form or by any device, 49 U. S. C. A., Section 41 (1) quoted in Appendix, *Post.*"

This argument is based on a nonexistent fact. The argument assumes that all other shippers in the United States have paid the tariff charge, regardless of compliance with the tariff provisions. Such an assumption is contrary to the facts and entirely unsupported by the record in this case. There is nothing in the record to support the argument made by petitioners.

Point C (p. 20) presents the same argument. Petitioners cite a great number of cases, but all of these are decisions where the courts upheld all the requirements of tariffs in order to prevent discrimination. We agree that rebates and discriminations are to be frowned upon and that agreements between carriers and shippers in contravention of tariffs are void. Contrary to these cases, petitioners seek to disregard essential provisions of the tariff in order to charge a shipper amounts stipulated as charges in the tariff. The cases relied upon by petitioners show that unlawful discrimination lies in a departure from tariffs rather than an adherence thereto. Petitioners seek to justify a failure to comply with a tariff by cases holding that such tariffs must be complied with.

The conclusive answer to petitioners' argument is that it has been repeatedly held that a carrier cannot recover where the tariff has not been strictly complied with, even though the shipper is benefited. In other words, it cannot be urged as a basis for ignoring tariff requirements that if it is not done benefits will accrue in favor of a shipper. *Chesapeake & Ohio R. Co.* v. *Westing-*

house, Church, Kerr & Co., 270 U. S. 260, 70 L. Ed. 576; *VanDusen Harrington* v. *Northern Pacific Railway Co.*, 32 F. (2d) 466; *American Railway Express Co.* v. *American Trust Co.*, 47 F. (2d) 16, cert. den. 284 U. S. 629.

In *Chesapeake & Ohio Railway Co.* v. *Westinghouse, Church, Kerr & Co., supra*, a carrier performed services for which it was not entitled to recover under the provisions of the applicable tariff. The carrier claimed that the shipper had secured the benefit of transportation service for which it should be compelled to pay, otherwise it would be receiving discriminations which should not be permitted. This court held that nevertheless a recovery could not be had which was not permitted and authorized by an applicable tariff.

In the *VanDusen Case, supra*, the railroad failed to comply with the requirement of a tariff that notice should be given as to the location of certain cars. It was held that having failed to live up to the letter of the tariff, it could not recover reconsignment charges, even though the shipper was benefited by the haul.

Following the decision of this court in *Davis* v. *Henderson. supra*, the Interstate Commerce Commission has repeatedly held that in order to be entitled to recover its charges, tariff provisions must be strictly complied with and the fact that a shipper is benefited will not justify recovery where a required agreement or notice has not been had in the manner required by the tariff. *American Lumber & Export Co.* v. *Central of Georgia Railway Co.*, 91 I. C. C. 65; *Milne Lumber Co.* v. *Michigan Central R. Co.*, 118 I. C. C. 580; *Republic Coal Co.* v. *Chicago, St. Paul Railway Co.*, 85 I. C. C. 331; *National Fireproofing Co.* v. *Bellefonte Central R. Co.*, 102 I. C. C. 345; *Central West Coal & Lumber Co.* v. *Chicago, B. & Q. R. Co.*, 104 I. C. C. 452; *Louisell Pine & Hardwood Co.* v *Chicago, R. I. & P. Railway*, 132 I. C. C. 341; *Consolidated Lumber Co.* v. *Lehigh Valley R. Co.*, 139 I. C. C. 278.

Any tariff, although it is discriminatory or contains technical requirements which make it difficult for the carrier to show performance, is nevertheless effective and has the force of law until changed in the proper manner. *United States* v. *Miller*, 223 U. S. 599, 56 L. Ed. 568; *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. Ed. 943.

So long as a tariff remains operative, all its provisions are binding upon shipper and carrier alike; the shipper cannot recover charges paid on the ground that they were unreasonable or discriminatory, nor can the carrier, without strict compliance with the tariff, recover its charges on the ground that failure to permit recovery would result in rebate or discrimination. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553; *Texas & P. R. Co.* v. *Cisco Oil Mill*, 204 U. S. 449, 51 L. Ed. 562; *Southern R. Co.* v. *Tift*, 206 U. S. 428, 51 L. Ed. 1124; *Robinson* v. *B. & O. R. Co.*, 224 U. S. 506, 56 L. Ed. 288; *Penn. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446; *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. Ed. 943; *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 67 L. Ed. 183.

V.

Petitioners cannot recover because this suit is based upon a tariff which the Interstate Commerce Commission has held to be unreasonable and unlawful.

After this suit was filed by petitioners, the validity and reasonableness of this tariff was determined by the Interstate Commerce Commission. The case was submitted to the commission on January 14, 1937 (R. 51). The shippers contended that it was the duty of the carriers, as part of their transportation service, to furnish cars with grain doors installed, but that if this were not true, the tariff in question was improper because the charge of $1.00 per car was unreasonable (R. 56, 63).

While the commission held that it was not unreasonable to require shippers to install the doors as part of their obligation to load the cars, the commission also held that the tariff in question was improper because the charge of $1.00 per car was unreasonable (R. 65). The commission ordered that the railroads establish a new tariff in the manner prescribed by Section 6 of the Interstate Commerce Act for a charge not to exceed 60 cents per car (R. 69-70). Under these facts, it is difficult to conceive how petitioners could recover on their petition which was based upon a tariff the Interstate Commerce Commission found to be unreasonable and unlawful. Petitioners attempt to justify a recovery by pointing out that in their requested finding they asked only a recovery at the rate of 60 cents per car. Even so, the action was based upon a tariff which the commission found to be improper and which the commission directed be supplanted by a new tariff for proper charges.

Throughout their argument, petitioners have treated the tariff in question as having the effect of law, claiming that charges under such tariff must be collected else there will be unlawful discrimination, completely overlooking and ignoring the fact that this tariff did not cover a service which could be required of the carriers, and further ignoring the fact that this was a carrier-made tariff, not a commission-made one. This court has held that carrier-made tariffs are always subject to being unlawful if found by the Interstate Commerce Commission to be unreasonable. In *Arizona Grocery Co. v. A., T. & S. F. Ry. Co.*, 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 348, this court said (284 U. S. l. c. 384):

> "Although the act thus created a legal rate it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful

rate, it was lawful only if it was reasonab
Under Section 6 the shipper was bound to pay t
legal rate; but if he could show that it was unreas
able he might recover reparation."

Moreover, while petitioners, by their petition filed
the district court, sought to recover on the tariff t
amount provided in the tariff, after the case was tri
petitioners have sought to change the nature of said su
and recover 60 cents per car on the theory that this
the reasonable value of the services they rendered. Th
evidence and the cases hereinbefore discussed show the
is no basis for such recovery. Furthermore a suit broug
as this one was cannot thereafter be converted into *quan
tum meruit*.

VI.

No jurisdictional grounds for review are presented.

The petition does not present any question of un
settled general law. This case involves simply the con
struction of a tariff and the trial and circuit courts ap
plied rules settled and established by decisions of th
court. The decision of this court in *Davis* v. *Henderso*
266 U. S. 92, 69 L. Ed. 182, not only supports the opinio
of the circuit court, but necessitates the conclusion
reached by both the trial court and the court of appeal
Since that decision it is settled that all the provisions i
a tariff must be strictly complied with and that suc
provisions cannot be waived. Moreover, the courts hav
repeatedly held that ambiguous tariffs must be construe
favorably to shippers. No new proposition or point o
law is involved in the opinion of the court of appeal

Petitioners rely on *Wabash R. R.* v. *Horn*, 40 F
(2d) 905 (C. C. A. 7). In this case it was held that on
who became the owner of a car of goods in transit wa
liable for freight charges, although he directs that th
charges follow the car. The reason for this holding wa
because the bill of lading so provided and the court simpl

held that in view of that circumstance such person was liable. This case merely requires an adherence to the tariff which is exactly what the trial and circuit courts held in the instant case.

The cases relied upon by petitioners throughout their brief are cases where the courts required strict adherence to tariff provisions and refused to permit waivers, agreements or discriminations conflicting with such tariffs to destroy their force and effect. None of these cases support the point urged by petitioners that the tariff in the instant case should not be strictly construed in order to permit petitioners to have a recovery in the face of explicit provisions in the tariff which have not been complied with.

Many of the cases cited by petitioners merely hold that the carriers are entitled to recover the full charges allowed by the tariff despite agreements, representations and estoppels to the contrary. These are cases where the tariffs are strictly complied with and the courts simply hold that such tariffs must be adhered to. None of these decisions support the points urged by petitioners.

Conclusion.

We respectfully submit that this case was correctly decided and that this court should so hold.

Respectfully submitted,

M. W. Borders, Jr.,
Dupuy G. Warrick,
Wilfred Wimmell,
Counsel for Respondent.

APR 15 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 242

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S PETITION FOR REHEARING.

M. W. BORDERS, JR.,
DUPUY G. WARRICK,
WILFRED WIMMELL,
Counsel for Respondent.

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Supreme Court of the United States

No. 342.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S PETITION FOR REHEARING.

Comes now Simonds-Shields-Lonsdale Grain Company, respondent herein, and respectfully petitions the court to grant it a rehearing in this cause for the following reasons:

I.

In its opinion this court permits a recovery for grain doors installed between July 1, 1935, and February 29, 1936. The basis for the court's opinion is that the letter of July 2, 1935, was sufficient to constitute a "prior arrangement." The court says:

> "The letter of July 2, 1935, from the shippers required the installation of the grain doors and the respective orders for the separate cars, given thereafter, were given in the light of this demand for cars so equipped. We think this was an arrangement under the tariff."

If it be conceded that the opinion of this court is correct, nevertheless there should not be any recovery for grain doors installed subsequent to November 22, 1935, because on that date the shippers unequivocally terminated any possibility of their prior conduct being interpreted as a prior arrangement. On that date they wrote the carriers denying that a prior arrangement had been made and disavowing liability because:

> "We have made no arrangement with any carrier under which such carrier was to install the doors as our agent as contemplated by the tariff above referred to" (R. 44).

While we earnestly contend that no prior arrangement was made by the letter of July 2, 1935, nevertheless, if this letter were sufficient for that purpose the prior arrangement and agency, if any, was discontinued by the letter of November 22, 1935. We cannot understand how it could possibly be contended that any prior arrangement and agency continued to exist after the shippers wrote their letter on November 22, wherein they disavowed and repudiated the existence of any agency or prior arrangement. In its opinion this court has inadvertently overlooked the foregoing facts, thereby permitting a recovery for cars on which grain doors were installed subsequent to November 22, 1935.

II.

In its opinion this court has said:

> "On July 2, 1935, the respondent clearly signified its desire for cars fully coopered and ready for loading. Its letter of that date was an unconditional request for the petitioners' services for a sufficiently specified period of time—'from and after July 1, 1935.'"

In holding that there was an "*unconditional*" request, this court has overlooked facts showing that the request of the shippers to install grain doors was upon the condition that the carriers stand the expense. The letter of

July 2 demanded the services on the condition that the carriers pay for installation, for the shippers unequivocally emphasized that they would not pay for the installations (R. 41, 42).

This court inadvertently overlooks the significant fact that the letter of July 2 could not have constituted a "prior arrangement" because the carriers did not so construe it. Nor did they construe the demand for grain door installations as unconditional. Indeed, they recognized a conditional demand and in written reply asked that the shippers make "*unqualified* arrangements" as required by the tariff, otherwise the carriers would "provide cars which do not have the grain doors installed" (R. 43). The opinion of this court gives no consideration to these facts which, we submit, are not only significant, but should be controlling.

On November 22, 1935, the shippers denied that the carriers were authorized to install car doors as their agents (R. 44). On January 9, 1936, the shippers again denied that any prior arrangement had been made. On March 30, 1936, the carriers wrote the shippers again asking that the shippers "advise whether you elect to have carriers furnish cars with grain doors or lumber installed, or whether you elect to install grain doors or lumber for your own account." The opinion of this court in holding that there was a prior arrangement has overlooked and ignored the foregoing facts showing that the shippers never intended to create a prior arrangement and that the carriers recognized that such arrangement had not been created but were continuously attempting to secure the necessary authorization to constitute them the "shipper's agent" and to establish "a prior arrangement." If there is anything apparent from the record in this case, it is that the shippers were unwilling to pay $1.00 a car for grain door installations (it should be kept in mind that the interstate commerce commission had not yet reduced the amount recoverable to 60 cents) and that their demands for installation were conditioned upon the carriers standing the

cost. We do not believe that a more significant or i portant condition could have been imposed on the shippe demands than that which they did impose, viz., that t carriers stand the expense of installation and we earnes submit that this court has overlooked controlling facts holding that the request was "unconditional."

III.

This court has overlooked and disregarded the de sions of this and other courts directly holding that, whe one demands the performance of services of another a the demand is accompanied by an insistence that the ser ices be performed at the other's cost, and without liabili to the person asking, there is no liability and there can no recovery. This court states:

> "The announcement that respondent would d cline to pay for them in no way qualified the reque for tariff services, and cannot now stave off liabilit The petitioners could disregard this advance di claimer of liability and rely upon the courts to e force observance of the tariff."

In support of its decision, the court cites no authorit There is none to sustain it. The statement that the p titioners could disregard disclaimer of liability and re upon the courts to enforce observance of the tariff ignor the fact that there could be no liability under the tari if the demand for grain door installations was qualifi in the manner it was in this case, because such qualific tion showed that there was no prior arrangement and th the carriers were not the "shipper's agent" as required b the tariff. The statement made by the court might be a plicable where the agency or prior arrangement was pr viously existing, but here it was not, and in applying suc simple rule to this case the court has disregarded the d cisions of this and other courts (all of which are cited i respondent's brief) which hold that, where one demand the performance of services of another and accompani

his demand by an insistence that the services be performed at the other's cost and without liability on him, there is no right of recovery. *La Compania Bilbiana de Navegacion De Bilboa* v. *The Spanish-American Light & Power Co.*, 36 L. Ed. 1054, 146 U. S. 483; *McWilliams Bros.* v. *Davis*, 285 Fed. 312; *McCaffrey's Sons* v. *Director General of Railroads*, 282 Fed. 730; *Drake* v. *Mo. State Life Ins. Co.*, 21 F. (2d) 41.

The only excuse for refusing to apply the foregoing rule to the instant case would be because this is a suit for railroad charges, but this is no answer because here the railroad was offering to perform a shipper's service as the shipper's agent, provided there was a prior arrangement for such agency between the two.

IV.

This court has overlooked the fact that the rule that tariffs must be strictly construed and that they have the force and effect of law applies equally to the requirement of an agency as to other matters. This tariff provided "the railroad will act as *shipper's agent* and install grain doors at terminal elevator points specified below, at a charge of $1.00 per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time."

When this court holds, as it does, that the agency may be found in the demand for installations at the carriers' expense, although accompanied by a disavowal of liability and of prior arrangement on the part of the shippers, it disregards every principle of contract and agency law to the effect that agency may not be created in such manner. In fact, it would appear that the court substitutes a new law to the effect that the provisions of a conditional offer may be accepted and the conditions thereof disregarded. Moreover, this court further disregards the numerous decisions of this court holding that all tariff provisions must be strictly complied with and can-

not be waived. *Davis* v. *Henderson*, 266 U. S. 92, 69 Ed. 182; *Louisville & N. R. Co.* v. *Chatters*, 279 U. 320, 73 L. Ed. 711; *Davis* v. *Cornwell*, 264 U. 560, 68 L. Ed. 848; *VanDusen Harrington Co.* v. *Northe Pacific Railway Co.*, 32 F. (2d) 466, 60 F. (2d) 394; *Amer can Railway Express Co.* v. *American Trust Co.*, 47 (2d) 16, cert. den. 284 U. S. 629.

V.

This court has inadvertently overlooked the fact th the Interstate Commerce Commission not only di approved the charge of $1.00 per car, but that it direct the railroads to file a new tariff. This court says:

> "The commission did not hold the tariff unlaw ful or wholly unreasonable. It clearly recognized t validity of a tariff charge for installation servic rendered by carriers at the request of shippers, b found $1.00 per car unreasonable to the extent th it exceeded 60 cents."

This holding overlooks the fact that the Interstat Commerce Commission did not simply reduce the amou of the charge and approve the existing tariff. It direct the carriers to establish a new tariff (R. 69, 70). Th issue submitted to this court in the briefs was wheth a recovery in this action based upon the original tari could be had when the original tariff for $1.00 per c was held unreasonable and a new tariff fixing a ra of 60 cents per car was established The court has n decided the issue submitted.

Moreover, this court has inadvertently overlooked th significance of the fact that the tariff provided a charg of $1.00, and that it was after this suit was filed that th Interstate Commerce Commission reduced the charge 60 cents. The court says:

> "The voluntary reduction of their claim by the petitioners is a sensible adjustment of their right to recover the tariff charge and of their obligation to make reparation to the extent that it is unreasonable."

To say that to permit a recovery of 60 cents is a "sensible adjustment" ignores that these facts were and are most significant in determining whether a "prior arrangement" whereby the carriers were "shipper's agent" was made. It is perfectly apparent that the shippers were unwilling to pay $1.00 per car. The Interstate Commerce Commission has held that the real value of the services rendered was not more than 60 cents. How can it be said that when the shippers disavowed any obligation to pay $1.00 per car there nevertheless was a prior arrangement under the $1.00 tariff, although the $1.00 tariff was held unreasonable? Had the tariff been 60 cents originally, the shippers might have been willing to constitute the carriers their agents but it cannot reasonably be argued that it makes no difference because the reduction of the claim to 60 cents constitutes a "sensible adjustment." If there was no arrangement to pay the $1.00 charge (and there was not because the shippers denied liability and because the charge of $1.00 was held unreasonable), it cannot be supplied simply because the unreasonable charge has been reduced to a reasonable amount.

VI.

This court has overlooked the established rule that tariffs must be strictly construed and, if ambiguous, are construed against the carriers. The courts have long since established that uniformity and the prohibition of rebates is best secured by a strict construction of tariffs. If this court feels that the points urged in this petition for rehearing are insufficient to show that the court has inadvertently overlooked significant facts and failed to decide important legal issues, respondent believes that its reason for doing so must be a belief that tariff provi-

sions in a case like this must be liberally construed in order that carriers may recover compensation for services rendered. We appreciate the equities that might seem to indicate the fairness in a recovery. Nevertheless, the law has always been and is now that provisions of a carrier's tariff must be strictly construed, cannot be waived and are to be construed favorably to the shipper. *Davis* v. *Henderson*, 266 U. S. 92, 69 L. Ed. 182; *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848; *Southern Pacific Co.* v. *Lothrop*, 15 F. (2d) 486; *Atlantic Bridge Co.* v. *Atlantic Coast Line R. R. Co.*, 36 F. (2d) 163; *Union Wire Rope Corporation* v. *A., T. & S. F. Ry.*, 66 F. (2d) 965; *Updike Grain Co.* v. *C. & N. W. Ry.*, 33 F. (2d) 486; *K. C. Southern Ry.* v. *Albers Com. Co.*, 223 U. S. 575; *Gulf P. & S. Ry.* v. *Hefley*, 158 U. S. 98; *K. C. Southern Ry. Co.* v. *Carl*, 227 U. S. 639.

We earnestly submit that the decision of this court can be sustained only by the most liberal interpretation which is not in harmony with the foregoing decisions. If the rule heretofore applied is to be disapproved in a case like this, then we respectfully submit that it should be directly decided.

CONCLUSION.

It is respectfully submitted that the opinion of this court holding that there was a "prior arrangement" and that the carrier was the "shipper's agent" overlooks and ignores the fact that it was not the intention of the shippers that their demands constitute a prior arrangement, that neither the shippers nor the railroads considered the demands sufficient to create such prior arrangement, that the facts are insufficient as a matter of law to constitute the railroad "shipper's agent," and that respondent should be granted a rehearing.

If this court should adhere to the views expressed in its opinion, it is respectfully suggested that in any

event the opinion should be modified so as to limit the recovery to grain doors installed between July 2, 1935, and November 22, 1935.

Respectfully submitted,

M. W. BORDERS, JR.,
DUPUY G. WARRICK,
WILFRED WIMMELL,
Counsel for Respondent.

CERTIFICATE OF COUNSEL.

We, M. W. Borders, Jr., Dupuy G. Warrick and Wilfred Wimmell, counsel for respondent herein, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or vexation; that in our opinion it is meritorious and well founded in fact and law.

M. W. BORDERS, JR.,
DUPUY G. WARRICK,
WILFRED WIMMELL,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 342.—October Term, 1938.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, Chicago, Rock Island and Pacific Railway Company, Petitioners,
vs.
Simonds-Shields-Lonsdale Grain Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 27, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

This case is here on certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit affirming a judgment of the district court for the respondent. Certiorari was granted for consideration of a federal question of substance, to wit, whether a carrier's charge for services, actually utilized by a shipper and authorized by a tariff requiring prior arrangements for the services, are uncollectable when the services are rendered on orders, preceded or accompanied by denials of legal liability. Substantial conflict was alleged.[1]

The facts were stipulated. The petitioners, as trustees of the Chicago, Rock Island and Pacific Railway Company, brought suit, under Section 24(8) of the Judicial Code,[2] in the United States District Court for the Western District of Missouri, for the value of services rendered in the installation of grain doors on box cars used by the respondent to ship grain in bulk in interstate commerce. Grain doors are required to prevent leakage of grain from the car while in transit. They are wooden barriers which must be placed inside the box car doors before loading and removed upon unloading. Before July 1, 1935, they were furnished and installed by carriers without separate charge. Effective that day, a tariff

[1] Cf. Wabash R. R. Co. v. Horn, 40 F. 2d 905, 906 (C. C. A. 7).

[2] 28 U. S. C. § 41. "The district courts shall have original jurisdiction as follows: . . . Eighth. Of all suits and proceedings arising under any law regulating commerce." See Louisville & Nashville R. R. v. Rice, 247 U. S. 201, 203.

filed with the Interstate Commerce Commission continued the carriers' practice of furnishing the materials for grain doors but shifted the cost of installation to the shippers. It provided as follows: "The railroad will act as shipper's agent and install grain doors . . . at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time . . . ."

On July 2, 1935, the day after the tariff went into effect, the respondent, together with other shippers, addressed a letter to the local freight agents of several carriers, including the Chicago, Rock Island and Pacific, in which they announced that despite the tariff they expected the railroads, from and after July 1, 1935, to furnish cars with equipment to carry bulk grain safely, and would decline to pay for the service of installing grain doors in the cars. They wrote in part: "Said undersigned parties further notify you that if ordinary box cars are furnished and supplied upon such orders [for cars for the shipment of bulk grain] they will expect them to be fully coopered or prepared with necessary side-door barricades completely installed and ready for loading."

The carriers protested that neither they nor the shippers could be parties to practices not in conformity with the tariff. They declared that unless the shippers made unqualified arrangements pursuant to the terms of the tariff, cars would be furnished without the grain doors installed. This letter, dated July 15, 1935, evoked no reply. Between July 1, 1935, and February 29, 1936, the petitioners upon the orders of respondent supplied the Grain Company with 624 box cars for the shipment of grain in bulk. Before the cars were loaded, the petitioners installed the necessary grain doors. Bills, rendered monthly, charged the respondent $1.00 for each car. On November 22, 1935, the latter returned the bills, declining to pay on the ground that it had made no arrangement for the petitioners to install grain doors as its agents, as contemplated by the tariff. It concluded with a request that petitioners reveal the justification for the charges in the absence of any arrangement. The petitioners' agent replied on January 9, 1936, that the letter of July 2, 1935, had been construed to effect an arrangement and "accepting such prior arrangement, the cars were coopered for your account and as your agent, and were accepted and used by you as such." By letter of January 15, 1936, the respondent disagreed with petitioners' construction of the letter of July 2, 1935, and reiterated its intention not to pay.

On April 4, 1936, the petitioners began this suit, asking judgment for $624. Before trial in the district court, the Interstate Commerce Commission passed upon the validity and reasonableness of the charge for this particular service. On April 12, 1937, the Commission ruled that it was proper to require the shipper to bear the expense of installing grain doors furnished by the carrier; that the clause relative to prior arrangements was not ambiguous; that it was for the carrier's benefit and could be waived; that the charge of $1.00 per car was unreasonable and should be limited to $.60 per car. It ruled further that shippers who had paid the $1.00 charge were entitled to reparation and that carriers might waive collection above the sixty-cent charge from shippers who had not yet paid. 220 I. C. C. 753.[3] The petitioners reduced their demand in the district court to $.60 per car and asked judgment for $374.40.

The district court gave judgment for the respondent. 19 F. Supp. 438. The circuit court of appeals affirmed, one judge dissenting. 97 F. 2d 816.

The ruling of the Interstate Commerce Commission determines that the installation is a duty of the shipper and that the carrier can only receive sixty cents when it acts for the shipper in performing that duty. These are the essential provisions of the tariff. To facilitate the rendition of the service prior arrangements are required. The dominant elements are the responsibility for and the amount of the charge. These are fixed by the tariff. The letter of July 2, 1935, from the shippers required the installation of the grain doors and the respective orders for the separate cars, given thereafter, were given in the light of this demand for cars so equipped. We think this was an arrangement under the tariff. On July 2, 1935, the respondent clearly signified its desire for cars fully coopered and ready for loading. Its letter of that date was an unconditional request for the petitioners' services for a sufficiently specified period of time—"from and after July 1, 1935." The announcement that respondent would decline to pay for them in no way qualified the request for tariff services, and cannot now stave off liability. The petitioners could disregard this advance disclaimer of liability and rely upon the courts to enforce observance of the tariff. Until

[3] Three commissioners dissented. The decision of the Commission is part of the record. A. J. Phillips Co. v. Grand Trunk W. Ry., 236 U. S. 662, 664; cf. Robinson v. Baltimore & Ohio R. R., 222 U. S. 506, 511-12.

changed, tariffs bind both carriers and shippers with the force of law.[4] Under Section 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property.[5] That section forbids the carrier from giving a voluntary rebate in any shape or form. This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate.[6] It is equally important to aid the efforts of a carrier in collecting published charges in full.[7] Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.

The respondent suggests that the suit must fail because based upon a tariff held by the Interstate Commerce Commission "unreasonable and unlawful." The Commission did not hold the tariff unlawful or wholly unreasonable. It clearly recognized the validity of a tariff charge for installation services rendered by carriers at the request of shippers, but found $1.00 per car unreasonable to the extent that it exceeded $.60. It awarded reparation to those who had paid $1.00 per car and authorized the carriers to waive collection of the amount over $.60 per car from shippers who had not paid.[8] The only relief afforded respondent by the Commission's decision is a right to reparation for all payments over $.60 per car.[9] The voluntary reduction of their claim by the petitioners is a sensible adjustment of their right to recover the tariff charge and of their obligation to make reparation to the extent that it is unreasonable.

It is unnecessary to consider various other contentions made by both the petitioners and the respondent.

Judgment reversed.

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[4] Robinson v. Baltimore & Ohio R. R., 222 U. S. 506, 509; Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, 197.

[5] Act of Feb. 4, 1887, 24 Stat. 379, 381, as amended, 49 U. S. C. § 6(7).

[6] Baltimore & Ohio R. R. v. United States, January 3, 1939.

[7] Cf. Pittsburgh, C., C. & St. L. R. R. v. Fink, 250 U. S. 577; N. Y. Cent. & H. Riv. R. R. v. York & Whitney Co., 256 U. S. 406.

[8] Chicago Board of Trade v. Abilene & S. Ry., 220 I. C. C. 753, 769.

[9] Cf. A. J. Phillips Co. v. Grand Trunk W. Ry., 236 U. S. 662, 665; Arizona Grocery Co. v. Atchison T. & S. F. Ry., 284 U. S. 370, 384.